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No. 08-1

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Supreme Court of the United States

TIMOTHY SULLIVAN and LAWRENCE E. DANSINGER,

Petitioners,

—v.—

CITY OF AUGUSTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "clearly erroneous" standard of appellate review in Rule 52(a) applies to the factual findings of a district court that support a holding in favor of First Amendment claims, as three circuits have held, or whether those findings should instead be subject to the plenary review that this Court has justified as necessary to ensure that First Amendment rights are not improperly abridged, as four circuits have held, including the First Circuit in this case?

2. Whether the First Amendment requires an indigency exception when government imposes large permit fees on the fundamental constitutional right of the people to assemble and march on public streets to engage in political protests, an issue on which the circuits are split?

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INTRODUCTION

Over a dissent, the First Circuit reversed the district court's ruling that the First Amendment requires an indigency exception to the $2,000 permit fee charged by the City of Augusta, Maine for political marches on its public streets. The court of appeals ruled instead that a sidewalk march was an adequate, free alternative. In so holding, the First Circuit widened existing circuit splits on two fundamental issues of First Amendment law.

The first is whether the exception to Rule 52(a)'s "clearly erroneous" standard of review applies not only when the First Amendment claims have been rejected by a district court, but also when they have been sustained. Here, applying a plenary standard of review to all "controverted matters," the panel majority disregarded the detailed factual findings of the trial court that a sidewalk march was a greatly inferior alternative to a street march in many respects, including that it would be less safe and thereby deter participants. In refusing to follow Rule 52(a)'s "clearly erroneous" standard of review, the First Circuit's decision directly conflicts with holdings of the Fourth, Seventh and Ninth Circuits. Since Justice White's dissent from denial of *certiorari* on this exact issue twenty years ago, the circuit split has only further widened to a 4-3 split.

The 2-1 panel decision of the First Circuit rejecting an indigency exception to large government fees on street marches also widens a pre-existing circuit split. That decision is in accord with a ruling of the Sixth Circuit but is in conflict with decisions of the Second and Eleventh Circuits. In 1990, this

Court granted *certiorari* to review the ruling of the Eleventh Circuit "that the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets," but the Court ultimately found it unnecessary to decide that issue, which remains open today. Two of the five active Judges on the First Circuit voted to rehear this case and a third Judge stated that "the difficult constitutional issue in this case is significant and would benefit from consideration by the Supreme Court."

OPINIONS BELOW

The opinion of the First Circuit is reported at 511 F.3d 16 (1st Cir. 2007), and reprinted in the appendix at 1a-88a. The final order and findings of fact of the district court are reported at 406 F. Supp.2d 92 (D. Me. 2005), and are reprinted in the appendix at 89a-165a. The district court order granting a temporary restraining order is reported at 310 F.Supp.2d 348 (D. Me. 2004), and reprinted in the appendix at 166a-180a. The order of the First Circuit denying rehearing is not officially reported. It is reprinted in the appendix at 181a-182a.

JURISDICTION

The decision of the First Circuit was entered on December 14, 2007. A timely petition for rehearing was denied on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, ORDINANCES AND COURT RULES INVOLVED

First Amendment to the U.S. Constitution

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AUGUSTA, ME. REV. CODE. ORD. ch. 13, § 5 (Parade Ordinance)

(e) The cost of the permit shall be one hundred dollars ($100.00), plus the costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Department. The permit fee will not include the cost of police protection for public safety. The one hundred dollar ($100.00) fee is payable at the time the application is submitted and the balance at the time of issuance. The City Council may modify this fee from time to time by Order.

Fed. R. Civ. P. 52(a)(6)

Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT OF THE CASE

1. Petitioners Sullivan and Dansinger are longtime peace and justice activists who live in Maine and seek to protest and reform governmental

policies they believe promote needless violence and economic inequality. In order to express those views by organizing peaceful marches in the streets of Maine's capital, Petitioners must comply with the terms of Augusta's parade ordinance, which requires parade organizers to pay a fee of approximately $2,000 for the costs of traffic control and clean up. Unlike other cities, Augusta has no provision for waiving the fee on the grounds of indigency, thus conditioning access to the public streets on the ability to pay. Because Petitioners lack the resources to pay the fee that Augusta requires, the challenged ordinance directly impairs their First Amendment right to engage in this traditional and time-honored form of American protest.

2. In February 2004, Timothy Sullivan applied to the City of Augusta for a permit to hold a march in the streets of the city on the anniversary of the invasion of Iraq. The purpose of the march was to increase public awareness of what Sullivan believes to be the adverse effects of the war in Iraq and to advocate for affordable health care, veterans' rights and benefits, living wage jobs, and greater honesty and openness in government. The march was scheduled for March 20, 2004, and Sullivan proposed three alternative parade routes.

Under the terms of Augusta's Parade Ordinance, Sullivan was informed that he would have to pay a $100 application fee, plus an amount intended to cover the police costs necessary to control and divert traffic during the march, as well as the costs of clean-up after the event. The costs of this additional fee varied with the route. Sullivan was told that the first proposed route would cost $2,077.44, the second

proposed route would cost $1,761.20, and the third proposed route would cost $1,543.08.[1] Sullivan was unable to afford the required fees; however, he was able to borrow the required amount from a sympathetic organization, and the March 20th march went ahead as scheduled. The prospect of having to pay another large fee that he could not afford deterred Sullivan from even applying for a second parade permit for a march that he was planning for April 10, 2004 in response to a major offensive in Iraq.

In August 2004, Lawrence E. Dansinger applied to the City of Augusta for a permit to hold a peace march on October 10, 2004, in conjunction with the Million Worker March that was scheduled to be held on the same weekend in Washington, D.C. Under the terms of Augusta's Parade Ordinance, Dansinger was told that he would have to pay $1,979.32, in addition to the initial application fee of $100, to obtain the permit. After his request for an indigency waiver was denied, Dansinger cancelled the planned march.

As of March 2004, Sullivan was a self-employed craftsman who made decorative model boats. He was earning between $500 and $750 per month, most of which was used to pay his living expenses. In addition, he had approximately $90 in liquid assets. Dansinger's sole income is a monthly payment of

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[1] The City of Augusta also required Sullivan to obtain event insurance for the march. That requirement was struck down by the district court, App. at 176a-180a, and later repealed by the City, *id.* at 4a.

$700 that he receives as a consultant. He is 60 years old and has very few assets.

3. In March 2004, Sullivan filed a complaint in federal district court, with jurisdiction based on 42 U.S.C. § 1983, challenging various provisions of Augusta's Parade Ordinance.[2] An amended complaint was filed in September 2004, and Dansinger was added as a plaintiff. Following discovery, both sides moved for judgment based on a stipulated record. Applying intermediate scrutiny, the district court struck down several provisions of the Parade Ordinance.[3]

Most significantly here, the district court accepted Petitioners' contention that Section 13-5(e) of the Parade Ordinance was unconstitutional, on its face and as applied, because it does not "provide any exception or reduction to the large permit fee for citizens or groups for whom the fee causes a substantial hardship."[4] Though the City argued that an indigency waiver for a street march was not

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[2] The complaint also challenged a second City Ordinance regulating mass outdoor gatherings. The First Circuit ultimately determined that Petitioners lacked standing to challenge this ordinance because it did not apply to their planned activities. *See* App. at 13a-26a. Petitioners do not seek review of that ruling.

[3] The district court had earlier granted a temporary restraining order that enjoined the City from enforcing the event insurance requirement for the March 20th parade. *See* n.1, *supra*.

[4] App. at 151a. The district court also found that the permit fee system was constitutionally flawed because it lacked sufficiently clear guidelines to channel administrative discretion. That holding was reversed by the First Circuit, and is not at issue here.

necessary given the availability of free alternatives, including a sidewalk march and a stationary rally, the district court rejected that defense.The district court supported its holding that an indigency waiver was necessary with a series of factual findings based on the record evidence, including the extensive testimony of Petitioners' expert witness, an associate professor at Bowdoin College. App. at 51a-52a, 156a-157a. In particular, the district court determined that a march is greatly superior to both a stationary rally and a sidewalk march as a means of communicating Petitioners' message to their intended audience, including the following key findings of fact:

First, because a sidewalk march would force participants to cross intervening streets carrying traffic, "the march would be less safe than a parade where traffic is stopped and there is a police presence." *Id.* at 157a. Such well-founded safety concerns "may deter some would-be participants." *Id.* In addition, if a march were held on a sidewalk, the marchers "might be forced to halt altogether to let traffic pass" through on side streets. *Id.*

Second, because a sidewalk march would not interrupt traffic and change routines, it "would not likely garner as much attention" from the media, government officials or the public. *Id.*

Third, a sidewalk march is inferior to a march down a public street for "logistical reasons." *Id.* "[T]he demonstrations would be narrower, which would not allow for wide placards or banners to be carried and may make the march look smaller." *Id.*

Fourth, the narrowness of a sidewalk march "may dampen camaraderie by preventing people from marching side-by-side with a critical mass of fellow protestors." *Id.* A street march, by contrast, is "more effective at promoting camaraderie and movement-building." *Id.*

Fifth, sidewalk marches have "less symbolic significance" than street marches. *Id.* Street marches resonate more with the public and media because of America's long history of such protest marches successfully spurring reform, such as the 1963 March on Washington. *Id.* at 156a-157a.

Based on these detailed factual findings that both a stationary rally and a sidewalk march are greatly inferior alternatives to the traditional street protests that Petitioners seek to organize and that have long been a part of American political life, the district court then concluded:

> To block indigents from using the public streets to convey their message, by pointing out channels of communication that may be used free of charge, but are inadequate, is unconstitutional. It is the equivalent of a determination that those who cannot afford to pay the fee either have a less important message to convey or must convey it in a less effective way.

Id. at 158a-159a.[5]

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[5] The district court also held that Petitioner Sullivan was unconstitutionally overcharged because the estimated fee that he was required to pay in advance was significantly less than the actual police costs incurred. *Id.* at 149a-150a.

Finally, the district court rejected the City's claim that it would be administratively impracticable to administer an indigency exception. After noting that Augusta and other governmental entities around the country routinely make indigency determinations in a variety of different contexts without apparent difficulty, the district court observed: "The question is not so much whether the exception would swallow the rule, but whether the rule would swallow the right." *Id.* at 154a n.28

4. By a 2-1 vote, the First Circuit reversed the district court's holding that the absence of an indigency exception to the $2,000 permit fee violates the First Amendment.

At the outset, the majority announced that, because this case involves a claimed abridgement of First Amendment rights, "[o]ur review of the controverted matters is plenary," including "the facts" embraced by the First Amendment claims at issue. *Id.* at 12a-13a (citation and internal quotation marks omitted). In defining the scope of appellate review, the majority explicitly rejected Petitioners' argument that it should make a distinction in its standard of review of fact findings between cases in which the First Amendment claim was rejected below, and cases like this one, in which the First Amendment claim was initially upheld by the district court. *Id.* at 13a n.1.

As a result, the First Circuit felt no need to declare the district court's fact findings about the greater safety and other major communicative advantages of street marches clearly erroneous under Rule 52(a), Fed. R. Civ. P., or, indeed, to grant

them any deference at all. Instead, the majority freely substituted its own factual findings for the factual findings of the district court regarding the suitability of the available free alternatives to a street demonstration. For example, the district court made the factual finding that a sidewalk "march would be less safe than a parade where traffic is stopped and there is a police presence." *Id.* at 157a; *see also id.* at 73a (Lipez, J., dissenting) (crediting trial court's critical factual finding that "safety concerns 'may deter some would-be participants' from joining a sidewalk march because of the need to cross traffic and the lesser police presence"). The majority chose to ignore this key fact finding of the district court.

Similarly, without any claim that the trial court had committed clear error, the panel majority disregarded or substituted other facts for the district court's central factual findings that for "logistical" reasons sidewalk marches are inferior to street marches in (1) reaching a wider and changing audience, (2) making the demonstration appear larger and attracting media attention, (3) enabling marchers to carry the wide placards or banners that are a standard part of political demonstrations, (4) building camaraderie and hence a movement, and (5) resonating with the public and media because of America's long history of protest marches. For example, the majority discounted the expert testimony credited by the district court concerning the serious disadvantages of a sidewalk march, and instead chose to rely on the testimony of the City's Deputy Police Chief, "that several groups have used sidewalk marches to engage in expressive activities,

indicating the availability of the sidewalk alternative and its appeal to some persons." *Id.* at 55a.

Because the majority held that the available alternatives were constitutionally adequate – even assuming that they resulted in a "diminution in the quantity of speech, a ban on a preferred method of communication, and a reduction in the potential audience," *id.* at 56a – it did not decide whether an indigency exception would be constitutionally required if those proffered alternatives were, in fact, inadequate.

Judge Lipez dissented. While agreeing with the majority that an alternative avenue of communication need not be precisely equivalent to be regarded as "ample" for First Amendment purposes, "under any meaningful standard of review," he wrote, "that alternative forum cannot be [deemed] ample if it lacks the qualities that make the streets a uniquely powerful forum for expression, and thereby leaves indigent speakers and the public they seek to influence with a substantially different and diminished First Amendment experience." *Id.* at 80a-81a. In contrast to the majority, he reviewed the factual findings of the district court and supporting record evidence at length and determined, based on that evidence, that the alternatives offered by the City failed to satisfy this constitutional standard. *See* App. at 80a. (Lipez, J., dissenting) ("The streets thus remain the only publicly accessible forum that offers speakers both the immediacy of personal contact and – in contrast to sidewalks – the realistic potential for attracting a large audience and widespread attention with a powerful message undiluted by space constraints."). Accordingly, he

voted to strike down the permit fee in the absence of an indigency exception.

5. A timely petition for rehearing and rehearing en banc was denied on February 29, 2008, by a 3-2 vote. In explaining his vote to deny *en banc* review, Judge Howard said: "While I doubt that en banc review would improve upon the analyses set forth in the panel opinions, the difficult constitutional issue in this case is significant and would benefit from consideration by the Supreme Court." *Id.* at 182a.

REASONS FOR GRANTING THE WRIT

This case presents two questions that have long divided the circuits and that are of fundamental importance in a constitutional democracy that honors free speech and that has long recognized, in this Court's words, that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

First, does the "clearly erroneous" standard of review in Rule 52(a) apply to the factual findings of a district court that support a holding in favor of the First Amendment, or should those findings instead be subject to the plenary review that this Court has justified as necessary to ensure that First Amendment rights are not improperly abridged?

Second, absent an indigency exception, does the imposition of a large permit fee on the right to march in the streets violate the core First Amendment

principle that "[f]reedom of speech [is] available to all, not merely to those who can pay their own way"? *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Both questions warrant this Court's review because of their significant effect on First Amendment rights. Both questions have produced serious and longstanding circuit splits. The answers to both questions provided by the First Circuit are, moreover, inconsistent with this Court's First Amendment jurisprudence.

A. The Circuits Are Divided, 4-3, On The Proper Standard Of Appellate Review In Cases Upholding First Amendment Rights.

This case presents a widespread and well-developed circuit conflict concerning the important issue whether the Rule 52(a) "clearly erroneous" standard of appellate review "applies to trial courts' findings of fact in cases striking down governmental restrictions on speech as contrary to the First Amendment." *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981 (1988) (White, J., dissenting from denial of *certiorari*). Since Justice White's dissent from denial of *certiorari* on this exact issue twenty years ago, the circuit split has only deepened. Now, four circuits have definitely ruled one way and three other circuits have definitely ruled the other way.

1. In *Bose Corp. v. Consumer's Union*, this Court held that the deference to trial court fact findings required by Rule 52(a) gives way when appellants are claiming interference with First Amendment rights. 466 U.S. 485, 509-10 (1984). De novo review of the record on appeal of denial of First

Amendment claims or defenses is justified "under the settled principle that [in] cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." Id.

This Court, however, has never resolved the converse question that this case presents. To date, the sole exception in free speech cases recognized by this Court to the Rule 52(a) standard of review has been limited to factual findings that reject or limit free speech claims, thereby triggering "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). The constitutional justification for overriding Rule 52(a) in these special circumstances is to assure that the lower court's "judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 568. This rationale for a heightened standard of review on appeal based on the unusual importance of First Amendment rights in our constitutional system only applies to lower court findings adverse to the "vindication of rights protected under the First Amendment." *Ferris v. Cuevas*, 118 F.3d 122, 125 (2d Cir. 1997).

Thus, both the holding and reasoning in *Bose* and its progeny leave unanswered the question whether Rule 52(a) deference can be set aside on appeal in favor of plenary review "of district court findings that favor as well as disfavor the First Amendment

claimant." *United States v. Friday*, 2008 WL 1971504 at *8 (10th Cir. May 8, 2008); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 245-46 (1985).

Here the First Circuit held that *Bose*'s plenary review applies, and Rule 52(a) does not, even when First Amendment claims are upheld in the trial court: "Our review here of the controverted matters is plenary," including "the facts" embraced by the First Amendment claims at issue. *Id.* at 12a-13a (citation and internal quotation marks omitted).[6] In

[6] In explaining its decision to apply plenary review "of the controverted matters," the First Circuit did refer to its own precedent applying de novo review to "mixed law/fact matters which implicate core *First Amendment* concerns." App. at 12a-13a. In light of the First Circuit's other statements in its opinion expressly rejecting a less than plenary standard of review for any part of the district court's controverted findings and the First Circuit's disregard of obvious historical fact findings of the trial court, its passing reference to mixed questions of law and fact cannot reasonably be interpreted as a silent acknowledgment that any of the district court's fact findings were entitled to substantial deference under Rule 52(a). In any event, this Court has stated that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College* v. *Russell*, 499 U.S. 225, 233 (1991) (citation omitted). Even when de novo review is warranted of a mixed question of law and fact, this Court has further instructed that the "reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges." *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *see also United States v. Friday*, 2008 WL 1971504 at *8 (10th Cir. May 8, 2008) ("Of course, the special *Bose* rule applies only to 'constitutional facts' and not to the basic

defining the scope of appellate review, the majority explicitly refused to make a distinction between appeals from the denial of a First Amendment claim and cases, like this one, in which the First Amendment claim was upheld by the district court. *Id.* at 13a n.1. Rather, the First Circuit extended the plenary review required in *Bose* for the review of the denial of First Amendment claims to cases, like this one, where such extraordinary review could only serve to defeat First Amendment claims upheld by the trial court.

A decision by this Court in favor of Petitioners on this standard of review issue would require that the decision of the First Circuit be either reversed or vacated. In reaching its ruling that an indigency exception was not required for the City's large permit fee, the First Circuit panel majority decision relied on the plenary standard of review to disregard several key factual findings of the district court. *See discussion at* pages 10-11, *supra*. Appellate courts, however, cannot avoid obligations to defer to the fact findings made in the trial court by ignoring them or by substituting their own. For example, this Court has recently ruled that an appellate court that owed deference to facts found at trial violated the standard of review both when it "disregarded critical evidence favorable to petitioner" and when it "discredited petitioner's evidence . . . by giving weight" instead to other evidence in the record. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 152-53 (2000). In *Reeves*, this Court concluded that by these actions

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historical facts upon which the claim is grounded, which are subject to the usual 'clearly erroneous' standard of review".).

"the Court of Appeals impermissibly substituted its judgment" for that of the factfinder at trial. Although *Reeves* involved review under Rule 50 on appeal of fact findings by a jury, this same logic applies when an appellate court reviews fact findings of the district court under Rule 52(a). *See Anderson v. Bessemer City*, 470 U.S. 560, 574 (1985) (interpreting Rule 52(a) to require reversal of court of appeals when it "improperly conducted what amounted to a *de novo* weighing of the evidence in the record" even when the district court's fact findings were based on "physical or documentary evidence or inferences from other facts" or even "essentially undisputed evidence").

2. In applying the plenary review required by *Bose* beyond this Court's holding and reasoning, the First Circuit aligned itself with three other Circuits—the Fifth, Tenth and Eleventh—that have "applied heightened review to all constitutional holdings defining the perimeters of unprotected categories of speech, regardless of whether the lower court held that speech was protected or unprotected." *United States of America v. Frabizio*, 459 F.3d 80, 96 (1st Cir. 2006) (Torruella, J., concurring) (citing *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987); *Lindsay* v. *San Antonio*, 821 F.2d 1103, 1107-08 (5th Cir. 1987).); *see also United States v. Friday*, 2008 WL 1971504 at *8 (10th Cir. May 8, 2008) ("The circuits have long been split on this issue. Although we have never explained why, this Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry.").

The First Circuit followed these other circuits based on the paradoxical reasoning that by applying plenary review on appeal of factual findings in favor of First Amendment claims the reviewing "court may reduce the likelihood of a 'forbidden intrusion on the field of free expression.'" App. at 13a (quoting *AIDS Action Comm. v. MBTA*, 42 F.3d 1, 7 (1st Cir. 1994)). That stated justification, however, supports the opposite conclusion that plenary review should not apply to trial court findings in favor of First Amendment claims.

In ruling as it did, the First Circuit only deepened a widespread division among the circuits, because at least three other circuits — the Fourth, Seventh and Ninth Circuits — have reached a contrary conclusion. *See Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988); *Planned Parenthood Ass'n Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225, 1229 (7th Cir. 1985). As the Ninth Circuit has explained "[w]hen a district court holds a restriction on speech constitutional, we conduct an independent, de novo examination of the facts. When the government challenges the district court's holding that the government has unconstitutionally restricted speech . . . we review the district court's findings of fact for clear error." *Munro*, 838 F.2d at 383. These three circuits that have decided not to apply plenary review to trial court factual findings in favor of free speech claims have all reasoned that no special solicitude need be accorded "the government's claim that it has been wrongly prevented from

restricting speech." *Planned Parenthood*, 767 F.2d at 1229.

The Fourth Circuit has justified this non-symmetrical standard of review on the ground that the requirement of plenary review in *Bose* "rested upon special solicitude for claims that First Amendment rights have been unduly abridged, requiring appellate courts to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Multimedia Publishing Co.*, 991 F.2d at 160. (citing *Bose*, 466 U.S. at 499) (emphasis in original; omitting other citations and internal quotation marks). Thus, like the Seventh and Ninth Circuits, but unlike the court below, the Fourth Circuit applies "the normal standard of review" to the district court's factual findings in support of First Amendment claims, requiring it to "sustain [those findings] absent clear error. Fed. R. Civ. P. 52(a)." *Id.*

The time is ripe for this Court to resolve the 4-3 split in the circuits and clarify that factual findings in favor of First Amendment claims are subject to appellate review under the normal Rule 52(a) clearly erroneous standard. Free speech rights are too important for this Court to leave unresolved such a clear "lack of uniformity among the circuit courts . . . as to the appropriate standard of appellate review in First Amendment free speech cases."[7]

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[7] L. Steven Grasz, *Critical Facts and Free Speech: The Eighth Circuit Clarifies Its Appellate Standard of Review for First Amendment Free Speech Cases*, 31 CREIGHTON L. REV. 387, 401 (1998) ("The one thing that stands out from a review of the

3. The First Circuit's analysis of this issue was also incorrect. Indeed, applying plenary appellate review in favor of the government when it appeals a ruling favoring free speech rights turns the logic of this Court's ruling in *Bose* completely on its head.[8] The purpose of de novo independent review in First Amendment cases is "to preserve the precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 511. When the government does not rely on any First Amendment claims, as here, there is no basis on appeal for any heightened standard of review in contravention of Rule 52(a).

Just last year, this Court emphasized that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *FEC v. Wisc. Right To Life, Inc.*, 127 S. Ct. 2652, 2659 (2007) (Roberts, C.J.). Thus, although symmetry is often a virtue in applying legal standards, symmetry is inappropriate when applying a heightened standard of review designed to protect, not suppress, free speech activities. As one scholar

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decisions from the various circuits is that there clearly exists a lack of uniformity among the circuit courts of appeal as to the appropriate standard of appellate review in First Amendment free speech cases. The formulation of the standard of review in free speech cases needs clarification from the Supreme Court in order to make appellate review more uniform in all circuits.").

[8] Grasz, *supra* n. 7, at 388 n.7 (1998) ("The utilization of a pure de novo standard of review by some courts in First Amendment free speech cases seems clearly at odds with the United States Supreme Court's standard of review described in Bose and more recently applied in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).")

has concluded, "if de novo review applies because of the First Amendment, the symmetrical scrutiny of pro-speech findings defies the basic point of the doctrine."[9]

When the free speech claimant wins below, as was the case here, plenary review is not justified by the First Amendment because there is no risk that the factfinder has erroneously abridged a constitutional right. To the contrary, plenary appellate review in this situation can only increase, rather than decrease, the risk of erroneously restricting speech protected by the First Amendment. [10]

Engaging in plenary review of factual findings on appeal of rulings in favor of First Amendment claims "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson v. Bessemer City*, 470 U.S. at 574. De novo review also unnecessarily and unfairly adds to the already heavy

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[9] Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1323 (1996); *see also* Edward H. Cooper, *Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 661 n. 58 (1988) ("If searching review is justified primarily by the desire to protect free expression, it might be argued that less searching review is appropriate if the district court has upheld a claimed first amendment right.").

[10] Grasz, supra n.7, at 396 ("If the appellate court feels free to disregard the trial court's fact findings, it can easily reinterpret the evidence and change the decision based on the appellate judges' opinions of the controverted issue. Complete de novo review of constitutional fact claims, therefore, would enhance the danger of an improper denial of a constitutional rights claim.")

burden of litigation for the parties: "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.*

Finally, plenary appellate review of factual findings also casts aside the important advantages of deferring to such findings by a trial judge, "who is more closely in touch than the appeals court with the milieu out of which the controversy before him arises," and who has the greater "expertise" in making accurate factual findings. *Id.* at 580.

B. The Circuits Are Divided On Whether A First Amendment Permit Requirement Can Be Upheld Without An Indigency Exception When The Effect Is To Deny Those Without An Ability To Pay Access To A Quintessential Public Forum.

The second question presented, which has also long divided the circuit courts, is whether government may restrict with large permit fees the fundamental constitutional right of the people to assemble and protest through a street march without regard to an applicant's ability to pay. The 2-1 panel decision of the First Circuit rejecting the need for an indigency exception to large government fees on free speech is in harmony with a ruling of the Sixth Circuit, but is in conflict with prior decisions of the Second and Eleventh Circuits.

1. This Court has previously considered whether permit fees for protest marches on public

streets are permissible under the First Amendment, but it has never resolved whether an indigency exception is required. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Court upheld a parade permit fee capped at $300, but it did not consider whether there should be an exception if the fee caused substantial hardship to an indigent applicant.[11] In the intervening years, this Court and other courts "have . . . refined the general rule announced in *Cox*, subjecting mandatory license and fee requirements to closer constitutional analysis." *Van Arnam v. GSA*, 332 F. Supp. 2d 376, 391 (D. Mass. 2004).

In 1992, this Court granted *certiorari* to review the ruling of the Eleventh Circuit "that the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 138 (1992) (Rehnquist, C.J., dissenting). The majority in *Forsyth*, however, found it unnecessary to decide the issue for which review was granted because of other constitutional defects in the parade permit scheme at issue. 505 U.S. at 133 (holding parade permit ordinance unconstitutional because of undue discretion allowed in determining the amount of the fee); *id.* at 133-137 (finding parade permit scheme unconstitutional because part of the fee was based on costs due to hostile reaction of listeners).

This Court should now reach the issue left open by its rulings in *Cox* and *Forsyth* by deciding

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[11] *See Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (11th Cir. 1985)("Importantly, the Court did not address circumstances where persons who wish to demonstrate are unable to pay the required fee . . . .").

whether the First Amendment prohibits government from imposing large fees on core free speech activities, such as political protest marches on public streets, without an exception for indigent persons who cannot afford to pay.

2. In rejecting an indigency exception, the First Circuit panel majority decision relied heavily on the ruling of the Sixth Circuit in *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991). In *Stonewall Union*, the Sixth Circuit held that an indigency exception to a street parade traffic control fee was not required by the First Amendment because of "the availability of the sidewalks and parks provides a constitutionally acceptable alternative for indigent paraders." *Id.* at 1137.

By contrast, the district court's ruling that the First Amendment requires such an indigency waiver is consistent with the rulings of two circuits that free speech fees similar in size or smaller than those at issue here were unconstitutional as applied to indigent persons. The Eleventh Circuit has ruled that a $1,436 fee, without an indigency exception, for a demonstration in city streets and parks was unconstitutional because "indigent persons who wish to exercise their First Amendment rights of speech and assembly and as a consequence of the added cost of police protection, are unable to pay such costs, are denied an equal opportunity to be heard." *Walsh*, 774 F.2d at 1523.. The Second Circuit has made a similar ruling striking down a governmental fee imposed, without an indigency waiver, on a protest march to be held on a dirt road used as a public forum. *E. Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1053, 1056-57 (2nd Cir. 1983). Although

not the exclusive basis for its decision, the Second Circuit upheld the appellants' contention that the $200 administrative fee and the insurance requirement costing $780 violated the First Amendment, even if facially valid, as applied to parties "who are demonstrably unable to comply and whose speech is therefore chilled by state action." *Id.* at 1053. In holding these fees unconstitutional, the court of appeals emphasized that they were being "applied to persons who have 'affirmatively alleged that they were *unable*, not *unwilling*, to pay.'" *Id.* at 1056.[12] *Cf. Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("[I]n the absence of reasonable alternative means of ballot access a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.").

3. Here, again, the First Circuit's approach is not only in conflict with other circuits, but inconsistent with this Court's precedents. Public streets have long been identified as a traditional public forum entitled to the highest level of First Amendment protection. *See, e.g., Perry Educators*

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[12] *See also Wilson ex rel. United States Nationalist Party v. Castle*, No. 93-3002, 1983 WL 276959, *4 (E.D. Pa. July 15, 1993) (insurance requirement invalid because not narrowly tailored at least as applied to persons "who are financially and otherwise unable to obtain coverage"); *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988) (holding that requirement of reimbursing town for police protection and cleanup, even if valid in some cases, was unconstitutional because it was not "waived or modified for indigents"); *Invisible Empire of Knights of KKK v. City of West Haven*, 600 F. Supp. 1427, 1435 (D. Conn. 1985) (bond requirement was unconstitutional as applied to those unable to afford a bond).

Ass'n v. Perry Local Education Ass'n, 460 U.S. 37, 45 (1983) (citation omitted). The "rights of the State to limit expressive activity are sharply circumscribed" in traditional public forums precisely because "use of the streets and other public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of the citizens," *Hague,,* 307 U.S. at 515.

Moreover, this Court has repeatedly emphasized that parades, especially protest marches, "'reflect an exercise of . . . basic constitutional rights in their most pristine and classic form.'" *Hurley*, 515 U.S. at , 568-69 (citation omitted). In *Hurley*, this Court ruled unanimously that parades are a "form of expression, not just motion" and that attracting media attention is a critical aspect of the unique effectiveness of a parade in conveying grievances. 515 U.S. at 568. Indeed, this Court has repeatedly ruled that "'symbolism is a primitive but effective way of communicating ideas'" and that "the First Amendment shields such acts as . . . 'marching, walking, or parading.'" *Id.* (citations omitted).

Not only did the Court in *Hurley* acknowledge that parades have historically been an especially effective method for those living in this country to convey grievances to their government, but the Court also recognized the critical importance of media attention as an aspect of the effectiveness of a parade: "Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, 'if a parade or demonstration receives no media coverage, it may as well not have happened.'" *Id.* at 568 (citation omitted).

The lack of an exemption for indigent persons or groups from large permit fees for marches in public streets leaves many in this country without the "open, ample alternatives for communication" mandated by the First Amendment. *Forsyth County*, 505 U.S. at 130. This Court has never countenanced that result and the First Amendment does not permit it. *See, e.g., Murdock v. Pennsylvania, 319 U.S. 105..*

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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May 28, 2008

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1177
December 14, 2007

TIMOTHY SULLIVAN and
LAWRENCE E. DANSINGER,

Plaintiffs, Appellees,

—v.—

CITY OF AUGUSTA,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. John A. Woodcock, Jr.,
U.S. District Judge]

Before

Boudin, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

Stephen E.F. Langsdorf with whom *Sigmund D. Schutz* and *Preti, Flaherty, Beliveau & Pachios, LLP* were on brief for appellant.

David G. Webbert with whom *Johnson & Webbert, LLP* was on brief for appellees.

CAMPBELL, ***Senior Circuit Judge.*** Defendant-appellant City of Augusta, Maine ("Augusta" or "the City") appeals from the judgment entered in favor of plaintiff-appellees Timothy Sullivan and Lawrence E. Dansinger in the United States District Court for the District of Maine. The court found that several provisions of the City's parade ordinance and of its mass outdoor gathering ordinance (the MOGO) violated the First Amendment.

On appeal, the City challenges the standing of the plaintiffs and the ripeness of their claims, especially their right to protest the MOGO. The City also challenges the district court's rulings that provisions of both ordinances violate the Federal Constitution. We conclude the plaintiffs did not have standing to sue regarding the MOGO's alleged defects, hence we vacate all the rulings of the district court regarding the constitutionality of that ordinance's provisions. We affirm the court's rulings that the advance notice and in-person meeting requirements of the parade ordinance are constitutionally defective and affirm the district court's ruling that the $478.55 overcharge to Sullivan was unconstitutional. However, we reverse its rulings that the fee provision grants excessive discretion to the

police and that the parade permit fee of $100 and associated charges for police traffic control are unconstitutional insofar as indigents must pay them without being given an opportunity to seek and secure a waiver on account of their indigency.

Background

On February 9, 2004, acting on behalf of a group known as the March for Truth Coalition, which advocates the "worldwide end of war and empire-building" and major social and economic reforms, Sullivan applied to Augusta's City Police Department for a permit under the parade ordinance, *infra,* proposing three routes over Augusta's streets for a protest march. The march would be held on Saturday, March 20, 2004, between 12:30-2:00 p.m. *See Sullivan* v. *City of Augusta,* 310 F. Supp. 2d 348, 351 (D. Me. 2004) ("*Sullivan I*"). The Police Department indicated it would grant the permit, and, in addition to the $100 base fee, charged Sullivan and the Coalition, as provided for in the ordinance, for what the Police Department estimated would be the cost of the extra police officers and police vehicles needed to control and divert traffic during the event. The Police Department also required the Coalition to provide a bond or other insurance.

Claiming the assessed estimate of traffic control costs and the bond were unconstitutional burdens on the exercise of his rights under the First Amendment, Sullivan moved on March 15, 2004 in the district court for a temporary restraining order ("TRO") enjoining the City from

imposing these conditions. The same day, Sullivan filed a complaint in the district court challenging the constitutionality of certain provisions not only of the City's parade ordinance, under which he had sought a permit, but also of the City's separate MOGO, under which he had not sought a permit. The district court granted the TRO in part, finding that Sullivan had standing to challenge the parade ordinance and enjoining Augusta from enforcing the bond requirement. The court also considered "the requirements of the application fee and costs of retaining law enforcement services" and concluded that "these portions of the ordinance are constitutional as applied." *Sullivan I*, 310 F. Supp. 2d at 354-55. The City subsequently amended the parade ordinance to delete the bond requirement, but left intact its other provisions. Thereafter, the Coalition paid the required amounts to the City, the parade permit was issued, and the march took place as scheduled on March 20, 2004. Sullivan did not seek, nor is there evidence he ever discussed with the Police, and the City did not request, that he obtain a second permit, under the MOGO, for the March 20, 2004 event.

Sullivan then amended his complaint on September 28, 2004, adding a second plaintiff, Dansinger. Dansinger had applied for a parade permit in August 2004 for a march he wished to hold in October of that same year. After the City Police Department responded to his application with a letter requiring him to pay a fee and costs of almost $2,000, Dansinger responded that he was unable to pay and sought, without response from the City, a waiver of the total amount of fee

and costs. No permit was issued, and the proposed October march did not take place.

Discovery followed the filing of the amended complaint, and the parties submitted the case to the district court on a stipulated record and filed cross motions for judgment on liability. A stipulated record "allows the judge to decide any significant issues of material fact that he discovers." *Boston Five Cents Sav. Bank* v. *Sec'y of Dep't of Housing & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1986). Here, the agreed-upon record included depositions of Sullivan, Dansinger, Joe Bandy (the plaintiffs' expert witness), and Augusta Deputy Police Chief Major Gregoire ("Gregoire"), and affidavits from Gregoire. Following oral argument, the district court issued a decision holding that the plaintiffs had standing to challenge both ordinances, that their claims were ripe, that various provisions both of the parade ordinance and of the MOGO violated the First Amendment of the Federal Constitution, and that there was no need for the court to abstain from ruling on the challenged ordinances. *Sullivan* v. *City of Augusta*, 406 F. Supp. 2d 92 (D. Me. 2005) ("*Sullivan II*"). The City filed this appeal from the district court's judgment entered in accordance with its decision.

The district court in its decision also found in the City's favor on plaintiffs' claim that it was violative of the Federal Constitution for the City to waive the parade permit fee for an event honoring law enforcement sponsored by the Maine Chiefs of Police Association, of which the City is a member. Plaintiffs did not cross-appeal from that unfavorable finding.

Facts

The following facts are taken from the district court's findings based on the stipulated record. *See Sullivan II*, 406 F. Supp. 2d at 95-99. As noted, Sullivan represented the March for Truth Coalition, which wanted to parade on the streets of Augusta to advocate for a variety of causes, including opposition to the Iraq war. The plaintiffs' challenges to the parade ordinance and the MOGO addressed several elements of both ordinances.

A. Parade Ordinance Fee

Portions of the Parade Ordinance, § 13-5, provide as follows:

> (a) No less than thirty (30) days prior to an intended parade, march or other use of public ways within the city, a permit must be applied therefor to the City Police Chief or his designee. The City Manager may allow a shorter time frame for good cause shown.
>
> . . .
>
> (c) Within ten (10) days of applying for the permit, as a condition to its issuance, the applicant must meet with the Police Chief to discuss and attempt to agree on the details of the route and other logistics.
>
> (d) The Police chief may deny the permit or alter the route for traffic or safety reasons and impose reasonable conditions

> including, but not limited to, time limits, requirement to keep moving and on route, no amplification or sound truck, no explosives, fireworks, or other artificial noise.
>
> (e) The cost of the permit shall be one hundred dollars ($100.00), plus the costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Department. The permit fee will not include the cost of police protection for public safety. The one hundred dollar ($100.00) fee is payable at the time the application is submitted and the balance at the time of its issuance. The City Council may modify this fee from time to time by Order.

Augusta, Me. Code § 13-5 (1991). "If the permit is denied o modified, the applicant may appeal in writing within five (5) day to the City Clerk's office for determination by the City Council. *Id.* at § 13-5(g).

B. MOGO

Section 3-116 of the MOGO provides:

> (a) It is recognized that a mass outdoor gathering attended by two hundred (200) or more persons may create a hazard to public health and safety. Accordingly, it is deemed to be appropriate and in the interest of the public welfare to regulate the conduct of such gatherings in order to protect the public health and safety.

> (b) No person shall sponsor, promote or conduct a mass outdoor gathering with the intent to attract or the understanding that the gathering may attract two hundred (200) or more persons until a permit has been obtained therefor from the Augusta Police Chief or his designee. The application for a permit must be submitted no less than thirty (30) days prior to the mass gathering, unless the City Manager allows a shorter time frame for good cause shown.

Augusta, Me. Code § 3-116 (1991).

Section 3-117 states:

> The Police Chief shall grant a permit to sponsor, promote or conduct a mass outdoor gathering to be attended by two hundred (200) or more persons upon written application therefor unless it appears to the Police Chief within a reasonable certainty that such gathering will unreasonably endanger the public health or public safety.

Id. at § 3-117.

Section 3-118 states:

> Prior to the issuance of a permit under this article, the applicant shall furnish the Police Chief with adequate proof that the following will be available at the gathering:
>
> (1) The furnishing of adequate and satisfactory water supply and sewer facilities;

> (2) Adequate refuse storage and disposal facilities, adequate medical facilities;
>
> (3) Adequate fire and police protection; and
>
> (4) Such other matters as may be appropriate for security of health and safety.
>
> The Police Chief may review such plans, specifications and reports as is deemed necessary for a proper review of the proposed mass gathering.

Id. at § 3-118. The permit fee is $100.00, plus the "cost estimated by the City for cleanup and traffic control." *Id.* at § 3-120. The MOGO provisions do not apply "to athletic events conducted by the Board of Education, Little League or other organizations, provided alcohol is not available." *Id.* at § 3-122.

C. Plaintiffs' Applications

i. Sullivan's February 9, 2004 Application

Of the three proposed parade routes in Sullivan's February 2004 parade permit application, Augusta Deputy Police Chief Major Gregoire, the officer delegated responsibility, under the Police Chief's oversight, to handle Sullivan's permit application, determined the first would require twelve officers and two police vehicles for traffic control, costing $2,077.44 and the second, ten officers and two police vehicles, costing $1,761.20. In later discussions, Gregoire approved a third route, costing, he said, $1,543.08. *Sullivan II,*

406 F. Supp. 2d at 97. To calculate these costs, Gregoire said he considered only the following factors: "the route to be taken, the duration of the route, the estimated number of people who will attend, whether marchers intend to close the entire road or only one direction of travel, and whether there are any other events or special circumstances within the City which could affect traffic." Gregoire testified that he based his assessment of traffic control needs only on factors "completely unrelated to the message to be communicated by marchers." Sullivan and his March for Truth Coalition did not themselves have the money to pay the permit fee, but they borrowed the necessary funds from another organization. As already noted, the fee was paid, the parade permit was issued, and the march went on as planned on March 20, 2004. At no time did the City intimate that Sullivan or the Coalition needed a second permit, under the MOGO, in order to conduct a lawful march.

ii. Dansinger's August 23, 2004 Application

On August 23, 2004, Dansinger applied for a parade permit to hold a peace march/rally on October 16, 2004, in conjunction with the Million Worker March scheduled in Washington, D.C., the next day. Dansinger had agreed he would apply for the permit and assumed Sullivan and Tony Aman, another protestor, "would be doing other aspects of the organizing." The Augusta Police Department responded to Dansinger's application by letter dated September 15, 2004, advising him that, in addition to the initial appli-

cation fee of $100, approval of the parade permit was conditioned on payment of $1,979.32. Dansinger responded with a September 29, 2004 letter from his attorney, explaining that the permit fee of almost $2,000 created a substantial financial hardship for him and requesting the fee be waived because of his limited financial means. This letter explained that Dansinger's annual income was $8,400, asserted that he could not afford to pay the additional estimated permit fee, and requested that Augusta establish an inability to pay exception for the traffic control fees charged for free speech activities. In spite of Dansinger's assertions of financial hardship, the Augusta Police Department did not offer to waive the fee or any part thereof, Dansinger did not pay the requested amount, no permit was issued, and the proposed October 16 march was not held.

D. District Court Decision

The district court found that various sections of the City's parade ordinance and MOGO, on facial challenge, violated the First Amendment of the Federal Constitution. The court determined that Section 13-5(e) of the parade ordinance providing that the cost of the permit will be $100, plus the costs of traffic control per city collective bargaining agreement and clean-up costs, as estimated by the Police Department, was unconstitutional because it vested too much standardless discretion in the police. The court held unconstitutional Section 13-5(a) of the parade ordinance and Section 3-116(a) of the MOGO to the extent that each requires thirty days' prior notice of a parade or MOGO application, unless the City

Manager allows a shorter time frame for good cause shown. The court also held unconstitutional Section 13-5(c) of the parade ordinance to the extent it requires, as a condition of its issuance, a meeting between the applicant and the police chief within ten days of applying for the permit to discuss and attempt to agree on the details of the route and other logistics of the parade. The court held unconstitutional Section 13-5(e) of the parade ordinance and Section 3-120 of the MOGO to the extent they contain no avenue for indigent permit seekers to obtain waivers of the fees specified therein. The court also held unconstitutional Section 3-122 of the MOGO, which exempts from permit requirements "athletic events" conducted by the Board of Education, Little League or other organizations, provided alcohol is not available.

Finally, the court noted in its opinion that there was no need for it to abstain from deciding these constitutional questions just because the plaintiffs had not appealed from the denial or modification of any of their permit requests to the City Council, as permitted by the parade ordinance.

Discussion

A. Standard of Review

Our review here of the controverted matters is plenary. Legal questions of standing and ripeness are obvious candidates for de novo review, and "where the trial court is called upon to resolve a number of mixed law/fact matters which impli-

cate core First Amendment concerns, the review . . . is plenary so that the court may reduce the likelihood of a 'forbidden intrusion on the field of free expression.'" *AIDS Action Comm.* v. *MBTA*, 42 F.3d 1, 7 (1st Cir. 1994) (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 285 (1964)). Plenary review is called for "simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).[1]

B. Standing and Ripeness

i. Standing to Challenge MOGO

The City of Augusta argues on appeal, as it did below, that the plaintiffs lacked standing to challenge any part of the MOGO. We agree. For standing to challenge the constitutionality of a particular municipal ordinance such as the parade ordinance or the MOGO, plaintiffs had to show an objectively reasonable possibility that the ordinance would be applied to their own activities. *See Osediacz* v. *City of Cranston*, 414 F.3d 136, 143 (1st Cir. 2005). In the case of the parade ordinance, under which Sullivan sought

[1] We find no merit in plaintiffs' contention that plenary review is reserved only for district court decisions denying First Amendment challenges, while decisions (as here) providing support for First Amendment claims are entitled only to more restricted review.

and actually received a parade permit and Dansinger sought, but did not obtain, a parade permit, plaintiffs have made a sufficient showing. But we find no similar showing sufficient to establish standing to challenge the MOGO, the City's mass outdoor gathering ordinance. Plaintiffs did not acquire or seek a MOGO permit. They did not allege, and there was no evidence in the record that anyone connected with the City ever indicated to plaintiffs, that they would be required to obtain a permit under the MOGO as a prerequisite to conducting their proposed street marches, nor was there evidence or even allegations that, in addition to a parade permit, plaintiffs needed, or reasonably believed they needed, a permit under the MOGO in order to conduct such activities in conformity with existing municipal policy and law.

As the district court recognized, the relaxation in First Amendment cases of certain prudential standing requirements does not mean that plaintiffs can dispense with the need to meet core Article III standing principles. *Osediacz,* 414 F.3d at 141; *see Sec'y of State of Maryland* v. *Joseph H. Munson Co.,* 467 U.S. 947, 956-57 (1984) ("[I]n the area of freedom of expression, an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable," but Munson still must "satis[fy] the requirement of 'injury-in-fact' and whether it can be expected satisfactorily to frame the issues in this case [i.e., its case must be 'ripe'].").

"Injury-in-fact" has been described by the Court as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations omitted). Plaintiffs have failed to carry their burden of showing that they have sustained any injury-in-fact on account of the MOGO. Without suffering such an injury, they lack standing to challenge the constitutionality of various provisions of that ordinance.

The district court recognized that plaintiffs were required to show injury-in-fact relative to the MOGO, and that to establish such injury in the present circumstances, they must show an objectively reasonable possibility they would need a permit under that ordinance in order to engage lawfully in their intended street marches. *See Osediacz,* 414 F.3d at 143. The court believed that such a showing had been made here. It construed the language of the MOGO as overlapping with that of the parade ordinance. It believed that marches such as plaintiffs sponsored or proposed, while covered by the parade ordinance, could also be considered to be mass outdoor gatherings if held with the intent to attract or with the understanding that the gathering may attract two hundred (200) or more persons; and that under the language of the MOGO, Augusta might (although it did not) require a separate MOGO permit *as well* as a parade permit.

In the district court's view, the undefined phrase in the MOGO, "mass gathering," could well include a parade. The City might want the

sponsor of "a large parade" to furnish the health and safety items specified in the MOGO, i.e., adequate medical facilities, adequate and satisfactory water supply and sewer facilities, and refuse storage and disposal facilities. The court believed that "sewer facilities" could be interpreted to mean portable toilets and that other terms could likewise be read in a way relevant to parades and marches.

The district court believed that the deposition testimony of Deputy Police Chief Major Gregoire, rendered on October 6, 2004, indicated the City's ambivalence about the MOGO's role. Asked whether a parade of 3,000 people for a mile down a City street was a mass gathering, Gregoire replied: "That's—I mean, that's an interpretation. I don't know. I would have to review what the ordinance said. They are moving and that type of thing. They could be considered a parade. It's a matter of interpretation." In the court's opinion, this reply was inconsistent with, perhaps even contradictory of, Gregoire's subsequent affidavit, dated March 15, 2005, in which Gregoire stated positively, "the City interprets the Mass Outdoor Gathering permit to only apply to a gathering which occurs at a fixed location."

The two, as it believed, inconsistent statements by Gregoire led the district court to conclude, "if Major Gregoire changed his mind once, he could do so again," and to find that "when plaintiffs applied for their permits, there was a reasonable possibility that the City might interpret the MOGO to apply to their conduct." The court ruled that "in light of Major Gregoire's changing testimony and in the absence of a long-standing

municipal practice, this Court finds the City of Augusta has not adopted an authoritative interpretation so as to eliminate its application to marches or parades."

With respect, we do not agree with the district court's analysis. We do not think plaintiffs have shown a realistic likelihood that, in addition to a parade permit, the City might have required them to receive a MOGO permit for the marching activities reflected in this record. Textually, we do not read the two ordinances as requiring persons like plaintiffs proposing an ordinary street march on the City's public streets to obtain more than a parade permit. And, if there were any question about this, Gregoire's affidavit as to the City's interpretation, uncontradicted by anything shown in the record, and supported by the City's consistent willingness to allow these plaintiffs to march without requiring more than a parade permit, is entitled to be credited as reflecting the City's authoritative view that a MOGO permit was not needed.[2]

a. Interpretation of the Language of the Ordinances

Looking first at the text of the parade ordinance, it requires a permit thereunder for "an intended parade, march or other use of public ways within the City"—precisely the events the plaintiffs intended and for which they sought,

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[2] We note, in addition, the total absence of allegations in the amended complaint, or facts in the stipulated record, indicating that the MOGO has in any way chilled or affected plaintiffs' conduct. *See infra*.

and in Sullivan's case received, parade permits. Plaintiffs never sought, nor were they advised by anyone to obtain, a MOGO permit, presumably because the parade ordinance alone referred specifically to parades and marches on the City's public ways, while the MOGO said nothing about moving events of this character. Rather, the MOGO addresses the licensing of what it calls, without further definition, "a mass outdoor gathering with the intent to attract two hundred (200) or more persons." The MOGO thus addresses an undefined (except for the 200-person benchmark) generic class of mass gatherings without any limits as to type or place. In comparable circumstances—given two ordinances, one specific and the other general—Maine's courts, like federal and other state courts, have followed the interpretive rule that "specific statutory provisions take precedence over general provisions." *Zeigler* v. *American Maize-Prod. Co.*, 658 A.2d 219, 222 (Me. 1995) (quoted with approval in *Camps Newfound/Owatonna Corp.* v. *Town of Harrison*, 705 A.2d 1109, 1115 (Me. 1998)). *See also Armstrong* v. *Town of Cape Elizabeth*, 2000 WL 33675379 (Me. Super., Dec. 31, 2000) (applying foregoing principle to Cape Elizabeth zoning ordinance). *See generally Busic* v. *United States*, 446 U.S. 398, 406 (1980) ("A more specific statute will be given precedence over a more general one . . . ."). Under this interpretive rule, the parade ordinance, which regulates in haec verba the very type of conduct in which plaintiffs intended to engage, i.e., a march on public ways, would seem likely to be construed—as in fact it has been by the City—to take precedence over the

more general MOGO, which makes no particular mention of conduct of this sort. It seems unlikely, therefore, that the two ordinances would be construed in pari materia, *viz.* as both applying equally to plaintiffs' proposed marches and as calling for dual permits and dual fees,[3] and, in fact, no such construction has ever been advanced by anyone on behalf of the City.

One can speculate, to be sure, as did the district court, that giant parades or unusually large or lengthy street marches might give rise to public health concerns similar to those upon which the MOGO focuses. Such hypothetical events, indeed, might even require fixed staging areas, in which case the MOGO might become applicable. But there are neither allegations in plaintiffs' amended complaint nor evidence in the stipulated record that plaintiffs' marches implicated gatherings of over 200 persons, that fixed staging areas or the like were contemplated, or that plaintiffs' marches were so large or of such duration as to give rise to public health considerations that might even arguably implicate a second permit under the MOGO.

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[3] We would add that the language used to describe the MOGO's requirements, while conceivably able to be stretched to large parades, seems far more apt to fixed locations. "[A]dequate and satisfactory water supply and sewer facilities" *could* conceivably extend to portable toilets, as the court said, but it is questionable if someone having portable toilets in mind would have described them in that way. At the very least, if the MOGO was meant to regulate the parades and marches already regulated by the parade ordinance, it would seem likely that one of the ordinances would have cross-referenced the other.

Sullivan's application for his march on March 20, 2004 stated it was to last only one and a half hours. Little else can be discerned from the record about the actual characteristics of plaintiffs' marches other than that, in Sullivan's case, the march occurred and that no suggestion was ever made by anyone that a MOGO permit, in addition to the parade permit, was required. Indeed, plaintiffs' amended complaint alleges that "Plaintiff [Sullivan] was not required in this instance to obtain a Mass Gathering Permit" and also states, "The only barrier to Sullivan exercising his right to free speech and assembly in the traditional public forum of Augusta's streets and sidewalks is his inability to pay over $2,000 for police salaries, police squad car use, and event insurance [all items connected with his application for a parade permit at the time he applied]." Dansinger's march did not occur, but, again, there is nothing whatever in the record to suggest that, in his case, anyone, including the Police Department and Dansinger himself, felt the parade ordinance was by itself insufficient to meet all the City's and the public's regulatory requirements. It is worth noting that paragraph (d) of the parade ordinance allows the Police Chief to "impose reasonable conditions including, *but not limited to* [certain conditions spelled out in the ordinance]" (emphasis supplied). Under paragraph (d), the Police Chief, without recourse to a separate MOGO permit, could presumably condition issuance of a parade permit on provision of specified facilities he thought reasonably necessary to safeguard public health should he

believe the circumstances of a particular parade or march so required.

Looking simply at the text of the two ordinances, therefore, we think it far less likely than did the district court that they would ever be read as requiring anything but a parade permit for the marches for which plaintiffs requested permits.[4] Significantly, the only allegation in the amended complaint regarding the MOGO's possible relevance is that it "employs legally identical requirements on applicants for mass outdoor gatherings" as does the parade ordinance and is subject to the same constitutional objections. No concrete facts of any kind are alleged showing how or why the MOGO, in addition to the parade ordinance, would apply to plaintiffs' street march activities so as to cause them to suffer injury-in-fact from that ordinance.

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[4] The City contends that for it to have read the two ordinances as requiring duplicative permits would also have violated the rule that statutes should be read so as to avoid constitutional difficulties. *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988). To require two permits for one street march would increase the burdens on those seeking permission to march and would arguably, by that fact alone, further chill their free speech rights. Additionally, the MOGO requirements would be open to challenge under the First Amendment as to whether or not the additional burdens they placed upon plaintiffs' First Amendment rights were excessive. Without passing on the validity of such contentions, we note the obvious fact that an interpretation that each of the two ordinances applied to plaintiffs would increase the scale of possible constitutional difficulties, while an interpretation that only the parade ordinance applies avoids many such difficulties.

b. The City's Interpretation of the MOGO in Gregoire's Affidavit

The City's own interpretation of the MOGO, as expressed in Gregoire's affidavit, has been consistent with the above textual reading. And while this interpretation was formally stated only after this litigation began, plaintiffs have neither alleged nor produced any evidence that the City, before Gregoire's affidavit, requested or received from anyone similarly situated to plaintiffs (much less plaintiffs themselves), a MOGO permit in addition to a parade permit. In other words, the City's actions have at all times been consistent with the City's interpretation stated in Gregoire's affidavit that the MOGO applies only to mass gatherings at fixed locations.

Deputy Chief Gregoire, who handled both types of permits for many years, testified to much experience with parades but very few mass gatherings, from which it would appear that the MOGO was not widely employed, and, one might infer, was not employed in duplicate fashion with parades. The fact that Sullivan's March 20, 2004 march took place with only a parade permit, issued without suggestion from the Police Department that he also needed a MOGO permit (which, like the parade permit, is handled by the Police Department), strongly supports the City's position, asserted in Gregoire's affidavit, that it interprets the MOGO to apply only to mass gatherings at fixed locations, not to parades and marches. It is plaintiffs' burden to establish injury-in-fact as an essential part of their standing—not the City's burden to disprove it. *See,*

e.g., FW/PBS v. *Dallas,* 493 U.S. 215, 231 (1990) (holding that standing must affirmatively appear in the record and it is the burden of the party seeking the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute). *See also Lujan,* 504 U.S. at 560-61; *Osediacz,* 414 F.3d at 139.

Here the evidence the district court saw as indicative of an ambivalent City policy to require a MOGO permit in addition to a parade permit was Gregoire's early deposition testimony, responding to a question whether a parade of 3,000 people for a mile down the street was a mass gathering. Gregoire's response was "That's—I mean, that's an interpretation. I don't know. I would have to review what the ordinance said." Gregoire then went on to say, in the same response, "They are moving and that type of thing. *They could be considered a parade . . .*" (emphasis supplied). Six months later, the City submitted to the court Gregoire's affidavit stating unequivocally, "The City interprets the Mass Outdoor Gathering permit to only apply to a gathering which occurs at a fixed location."

Between Gregoire's earlier deposition testimony and his later affidavit stating the City's final position, we see no discrepancy such as to warrant the district court's finding that he had a "change of mind." His deposition response came in answer to a question that could easily have caught Gregoire by surprise, about whether an enormous hypothetical 3,000 person parade extending for a mile would be a mass gathering. Gregoire said, in effect, he didn't know—he

would have to review what the MOGO said. Even so, he then suggested that, "They could be considered a parade." In the six months that followed, Gregoire had the opportunity to review the issue, to reread the ordinances, and to consult with the Police Chief and other City officials, after which his affidavit was filed stating unequivocally the City's interpretation of the MOGO. That he consulted with superiors and spoke for the City, not just himself, can be inferred from the fact that in the affidavit he purported, under oath, to speak for the City; it is only reasonable to assume that a ranking officer like Gregoire would not have purported to speak for the City in important litigation of this type without first obtaining authorization. While he was not the Police Chief or City Manager, he was the second in command in the Police Department, the agency empowered by the two ordinances to issue both parade and mass outdoor gathering permits, and, subject to the Chief, was in charge of reviewing and acting upon applications to hold parades and marches in Augusta.

As we say, we can see no contradiction between Gregoire's guarded reply during his earlier deposition and his later affirmative affidavit. The earlier response at most suggests uncertainty. He said nothing directly contrary to what he later represented in his affidavit was the City's interpretation. That the City interpreted a MOGO permit to apply only to a gathering which occurs at a fixed location fits reasonably within the language of the two ordinances, *supra*, is consistent with the City's practices as reflected in this record, and is entitled to be taken as an author-

itative representation of the City's interpretation of its own ordinance. *See Forsyth County* v. *Nationalist Movement,* 505 U.S. 123, 131 (1992) ("In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it").

This is not a case where the agency's interpretation during a lawsuit repudiates its earlier interpretation, suggesting the later-announced interpretation might be a ploy to end the lawsuit and leave the agency free to return subsequently to the very practices that caused the plaintiff to sue. There is absolutely no evidence to suggest that Gregoire's affidavit of the City's interpretation constituted a repudiation of or departure from some earlier different practice of the City, nor have plaintiffs so alleged. *Compare Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 189 (2000) (observing that defendants' cessation of challenged practice during course of litigation did not guarantee they would not return to practice after dismissal). The district court criticized the City for not establishing that Gregoire's assertion of its interpretation reflected "a longstanding municipal practice," but the City's treatment of these plaintiffs has from the start been entirely consistent with the interpretation of the MOGO stated in Gregoire's affidavit, and plaintiffs, whose burden it is, have produced no evidence of any inconsistency at any time in the City's treatment of others. We see no reason not to accept the City's asserted interpretation under these circumstances.

We hold that plaintiffs did not meet their burden of establishing a "reasonable possibility" that, in applying to hold their street marches along City streets, they were or would be held subject to the MOGO as well. We conclude, therefore, that plaintiffs lack standing to litigate the various issues they raise concerning the alleged defects in the MOGO as distinct from those in the parade ordinance. We vacate the district court's judgment insofar as it relates to any of the provisions of the MOGO.

Because plaintiffs lack standing to challenge the MOGO, we need not examine the "ripeness" of their MOGO claims. Without standing, plaintiffs' challenges to the MOGO provisions must be dismissed.

ii. Standing to Challenge the 30-Day Advance Application Requirement in the Parade Ordinance

The City argues that the plaintiffs do not have standing to challenge the provision in the parade ordinance, § 13-5(a), requiring applicants to apply for a permit "no less than 30 days prior to an intended parade, march or other use of public ways within the City." The City does not challenge plaintiffs' standing to mount constitutional claims as to any other provisions within the parade ordinance. The City notes that plaintiffs never demonstrated any intent or need to apply for their parade permits fewer than thirty days before the marches for which the permits were being sought. Sullivan made a timely application for his permit, which ultimately he received. Dansinger never completed his application for a

parade permit, but was timely in his initial application, so that it does not appear the 30-day requirement was, for him, a stumbling block.

But, notwithstanding their apparent ability to comply, we believe the plaintiffs have standing to challenge, along with other provisions of the parade ordinance, the constitutionality of the thirty-day advance application provision. While it is true they never applied later than the thirty days before the sought-for permit, a late application is not necessary if injury can otherwise be surmised. *Osediacz,* 414 F.3d at 143. Sullivan indicated such injury in his deposition testimony that in late March 2004, he was deterred from applying for a permit for an intended April 10, 2004 street march because it was too late for him to comply with the thirty-day advance notice requirement.[5] Sullivan's testimony was, we believe, enough to permit plaintiffs to pursue a facial challenge to the thirty-day requirement as part of their overall attack on various aspects of the parade ordinance.

Because there was a showing of injury sufficient for standing to attack the thirty-day provision, we need also to determine the ripeness of this claim.

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[5] The thirty-day provision, to be sure, is qualified by authorization to the City Manager to "allow a shorter time frame for good cause shown." But because we find that essentially standardless provision to be insufficient to redeem the thirty-day requirement, *infra,* we believe that Sullivan's complained-of deterrence suffices to establish injury, especially where there is no question as to plaintiffs' standing to challenge, on First Amendment grounds, other aspects of the very same ordinance.

Ripeness calls for an evaluation of the fitness of the claim and the hardship to plaintiffs of withholding immediate judicial consideration. *Rhode Island Ass'n of Realtors, Inc.* v. *Whitehouse,* 199 F.3d 26, 33 (1st Cir. 1999). We have said that when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements. *El Dia, Inc.* v. *Hernandez Colon,* 963 F.2d 488, 496 (1st Cir. 1992) (stating that a "facial challenge of this sort, implicating First Amendment values, customarily works a relaxation of the ripeness criteria"). The rationale for this relaxation is said to stem from a fear of "irretrievable loss." *Id.* Thus, when First Amendment claims are presented, "[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim." *New Mexicans for Bill Richardson* v. *Gonzales,* 64 F.3d 1495, 1499 (10th Cir. 1995) (quoting *Martin Tractor Co.* v. *Federal Election Comm'n,* 627 F.2d 375, 380 (D.C. Cir.), *cert. denied,* 449 U.S. 954 (1980)). The standing and ripeness concerns are intertwined, with the core issue being the reasonable fear of enforcement. *Whitehouse,* 199 F.3d at 33. Here, Sullivan testified to believing that the requirement to apply for a parade permit thirty days before the event blocked his eligibility to receive a permit for a short-notice street march he wished to hold on April 10, 2004 and that, as a result, he did not apply for a permit and did not hold the march. His concern as to this provision is closely linked to other concerns of and alleged injuries to plaintiffs stemming from the parade ordinance's effect upon them. We believe plaintiffs' challenge to the

thirty-day provision is fit to be decided now in this litigation, and that it would be a hardship to plaintiffs were we not to do so. The challenge to the thirty-day requirement was and is ripe for present review.

C. Parade Ordinance Issues

The district court struck down several provisions in the parade ordinance as unconstitutional, holding them facially to violate the First Amendment of the Constitution. Before considering each of these in turn, we discuss certain generally applicable principles mentioned also by the district court. *Sullivan II*, 406 F. Supp. 2d at 106-07.

The district court properly held that protest street marches such as the ones plaintiffs conduct are forms of assembly and expressive speech protected by the First Amendment. *See, e.g., Hurley*, 515 U.S. at 568. That protection is not absolute, however, since the First Amendment rights must be harmonized with the "existence of an organized society maintaining public order without which liberty itself would be lost . . . ." *Cox* v. *State of New Hampshire*, 312 U.S. 569, 574 (1941). The Supreme Court went on to say in *Cox* that regulating the use of the public streets and restricting the use of highways to promote the public convenience, "cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." *Id.* at 574. The Court thus upheld in *Cox* a municipality's right to require marchers to obtain a license and pay a fee (not more than $300, at the time) before parading on public

streets. The Court stated that "the question in a particular case is whether . . . [the City's] control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.*

A notable aspect of the Supreme Court's analysis in *Cox,* as the district court observed, is that a municipality's parade permit ordinance is not to be reviewed as a "prior restraint" but as a reasonable regulation of the "time, place and manner in relation to the other proper uses of the streets." *Cox,* 312 U.S. at 576. The Supreme Court has recently reiterated this standard in regard to a municipality's content-neutral regulation of parades and other public assemblies in its parks. *See Thomas* v. *Chicago Park District,* 534 U.S. 316, 322-23 (2002).[6]

Augusta's instant parade ordinance is plainly content-neutral, as the district court found.[7]

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[6] In *Ward* v. *Rock Against Racism,* 491 U.S. 781, 791 (1989), the Supreme Court explained that "the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." The main inquiry is not whether certain speakers are disproportionately burdened, but rather, whether the reason for the differential treatment is, or is not, content-based. *See Hill* v. *Colorado,* 530 U.S. 703, 719-20 (2000).

[7] While acknowledging that the parade ordinance is content-neutral on its face, the plaintiffs have argued to us that Augusta applied the ordinance in a viewpoint-discriminatory manner by waiving the parade permit fee for the Maine Chiefs of Police Association's annual parade. The

Unlike regulations that are not content-neutral, which are reviewed under a harsher strict-scrutiny standard, *e.g.*, *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000), content-neutral regulations are reviewed under so-called intermediate scrutiny. Intermediate scrutiny calls for narrow tailoring to serve a legitimate, content-neutral governmental interest, but the tailoring need not be the least restrictive nor the least intrusive possible. *Ward*, 491 U.S. at 798. *See also Casey* v. *City of Newport*, 308 F.3d 106, 110-11 (1st Cir. 2002); *Nat'l Amusements, Inc.* v. *Town of Dedham*, 43 F.3d 731, 736-37 (1st Cir. 1995). Time, place and manner regulations of this type are constitutional if they: (1) do not delegate overly broad licensing

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district court disagreed. It found that the City's waiver of the fee did not "disfavor or suppress one viewpoint in favor of another." Rather, it held, Augusta had merely used its funds permissibly to promote a speaker deemed to be in the public interest.

Although plaintiffs now argue against the district court's resolution of this issue, they have never filed a cross-appeal from the district court's determination that the waiver of fee for the Maine Chiefs of Police Association's annual parade is constitutionally permissible. We therefore lack jurisdiction to consider plaintiffs' objections to the district court's specific ruling on this issue. *See United States* v. *Craven*, 239 F.3d 91, 103 (1st Cir. 2001); *Justice for All* v. *Faulkner*, 410 F.3d 760, 772 (5th Cir. 2005). *Cf. Johnson* v. *Teamsters Local 559*, 102 F.3d 21, 28 (1st Cir. 1996) (dismissing late-filed cross-appeal for lack of appellate jurisdiction). To the extent plaintiffs pursue this claim on appeal on the ground that we may affirm the district court's judgment invalidating the fee provision on any basis supported by the record, we concur with the district court that the waiver of the permit fee did not constitute viewpoint discrimination.

discretion to a government official; (2) are narrowly tailored to serve a significant governmental interest;[8] and (3) leave open ample alternatives channels for communication of the information. *Thomas*, 534 U.S. at 323; *New Eng. Reg'l Council of Carpenters* v. *Kinton*, 284 F.3d 9, 20 (1st Cir. 2002). We apply these standards in our review of Augusta's parade ordinance.

We turn now to the constitutionality of the different parade ordinance provisions.

i. Traffic Control Fee

Plaintiffs contend, as the district court held, that even under the intermediate scrutiny afforded content-neutral time-place-manner regulations, the fee provision of the parade ordinance is unconstitutional. Section 13-5(e) provides, "The cost of the permit shall be one hundred dollars ($100), plus the costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Department." The ordinance further provides, "The permit fee will not include the cost of police protection for public safety." The $100 fee is payable at the time the application is submitted and the balance at the time the permit is issued.

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[8] Justice Kennedy, writing for the majority in *Ward*, emphasized that while narrow tailoring in the content-neutral context was more relaxed, the regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.

The district court held that the fee provision delegated overly broad discretion to the Augusta Police Department to determine the costs of traffic control—costs which plaintiffs were required to pay as a part of the total parade permit fee. Citing *Forsyth*, 505 U.S. at 132-34, the court ruled that the fee provisions of the parade ordinance were lacking in narrow, objective and definite standards sufficient to guide the discretion of the Augusta Police Department in estimating the costs of traffic control. *Sullivan II*, 406 F. Supp. 2d at 116.

The district court refused to consider as supplementing the ordinance's own standards an affidavit from Deputy Chief Major Gregoire in which he stated certain of the factors on which he based his calculation of the traffic control fee. *Id.* at 116-17. The district court ruled that the factors set forth in Gregoire's affidavit went beyond anything found in the text of the ordinance itself and were not shown to reflect the City's "well-established practice," citing *City of Lakewood* v. *Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1998). *Id.* at 117.

The district court also found that "the City charged Mr. Sullivan $478.55 more than its actual overtime payments" to the officers who served on the detail assigned to Sullivan's March 20, 2004 parade. This overcharge resulted from the fact that the City estimated how many officers would be needed for traffic control, and what they would be paid, before it knew which particular officers would be available for the parade detail. *Id.* at 121-22. The City's collective bargaining agreement requires paying each officer

for a minimum overtime shift of four hours, but the pay rate of individual officers differs. In the present case, the original estimate exceeded by $478.55 the cost of paying the officers who took part in the March 20, 2004 parade detail. Sullivan paid the original estimate, and no refund was tendered. The district court rejected the City's argument that the pay overcharge was offset by the City's not charging Sullivan for certain of its administrative expenses, such as Gregoire's own time to schedule and organize the parade detail. There was no evidence in the record as to the latter costs. Pointing to precedent that only a fee defraying actual expenses is permissible, and that excess fees are unconstitutional, the district court held that the fee was "overbroad" as it "does not bear a direct or precise relationship to the actual costs incurred." *Id.* at 122.

Plaintiffs complained below, as they do now, that the Police Department's determination of the estimated cost of traffic control "relies heavily on a judgment call about the number of officers that are required to provide traffic control" because the department "has never established any written criteria or formula for calculating the number of officers or vehicles as part of its estimate of the traffic control cost." They argue this "broad subjectivity and discretion" was highlighted by the police department's increase of "its estimate by twenty percent, from eight to ten, for the number of police officers needed to provide traffic control for the parade route used on April 8, 2003 when the same exact route was proposed for the March 20, 2004 parade." They additionally argue that the provision's excessive discre-

tion and overbreadth are demonstrated by the fact the City overcharged them for the actual cost of the additional officers during the March 2004 parade organized by Sullivan.

a. Excessive Discretion

We disagree with the district court and appellees that the parade ordinance fee provisions lack sufficiently precise and definite standards to guide the police. We agree, however, that the permit fee charged to and paid for by Sullivan for the March 20, 2004 parade, which the court found was incorrectly inflated by nearly $500, was, to that extent, unconstitutional as applied.

In deciding that the fee provision in the parade ordinance granted constitutionally "excessive" or "unfettered" discretion to the Augusta Police, the district court relied particularly upon the Supreme Court's holding in *Forsyth,* 505 U.S. at 137. In that case, a county ordinance mandated permits for private demonstrations and other uses of public property, required advance payment of a daily fee of no more than $1,000, and empowered the county administrator to "adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order." *Id.* at 123. The Court found the ordinance unconstitutional, noting, inter alia, (1) the county administrator's "unfettered discretion" to determine what expenses to include and to set the amount of the fee,[9] and (2) the fact that the

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[9] The Court emphasized the total absence of "articulated standards either in the ordinance or in the county's

ordinance allowed the fee to include the costs of "necessary and reasonable protection of persons participating in or observing said . . . activities." *Id.* at 133. The Court held the latter costs were an improper charge upon the permittee, equating it with basing a fee on the content of the speech. *Id.* at 133-36.[10]

While *Forsyth* stands as a clear warning against vesting governmental officials with excessive discretion in regard to fee-setting,[11] and while "even content-neutral time, place and manner restrictions can be applied in such a manner as to stifle free expression," *Thomas,* 534 U.S. at 323, the range of fee-setting discretion granted to the county administrator in *Forsyth* far exceeded that granted here to the Augusta Police Chief and Police Department. In *Forsyth,* unlike here, the county administrator was not limited to estimating, as part of the fee, a particular category of expenses within the administrator's expertise,

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established practice," to guide the administrator's fee-setting discretion. "The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator." 505 U.S. at 133.

[10] *Forsyth* involved a content-based, not content-neutral, ordinance, but the analysis of overly broad discretion as discussed in *Forsyth* has also been applied in cases involving content-neutral ordinances. *See Thomas,* 534 U.S. at 323.

[11] Citing *Forsyth* and *Niemoto* v. *Maryland,* 340 U.S. 268, 271 (1951), the *Thomas* Court stated, "We have thus required that a time, place and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." 534 U.S. at 323.

like the costs of traffic control. Instead he had discretion to decide the kind and amount of administrative and policing expenses to include (or exclude) from the fee, and it appears that he also assumed the right to charge nominal or no fees to favored groups. *Forsyth,* 505 U.S. at 131-32 & n.9.

The fee-setting authority of the Augusta Police Department is far more confined here. The ordinance provides, "The costs of the permit *shall be* one hundred dollars ($100) plus the costs of traffic control per city collective bargaining agreement and clean-up" (emphasis supplied). The Police are given no discretionary authority to estimate and charge costs other than the costs of traffic control and clean-up, nor are they authorized to vary the character of the costs as between applicants: the cost of each permit "shall be" as described, resulting in a uniformly-computed fee for each applicant. The cost of hiring police officers for traffic control is "per city collective bargaining agreement," requiring reference to that agreement for the amount to be paid to each officer. Finally, the "cost of police protection for public safety," the item the Supreme Court found to be improperly included in the *Forsyth County* ordinance, is expressly excluded by the parade ordinance from the costs passed on to permit applicants.

Given the above limitations, the principal area left to police discretion in estimating the Augusta permit costs lies in determining the number of extra officers and police vehicles to assign to a particular parade or march for traffic control purposes. Plaintiffs complain the City has failed

to articulate a precise "formula" to guide the police in performing this estimate. However, the plaintiffs have pointed to no evidence that there exists any meaningful advance "formula" that could be inserted in an ordinance to determine the number of needed officers and vehicles in a given case. Parades and marches obviously vary enormously in terms of size, timing, duration and location, resulting often in quite different traffic control needs. Experienced, professional judgment would seem to be the most likely way to estimate how many extra officers will be needed. The City states that the present marches involved the use of very heavily trafficked streets, requiring diversion of traffic elsewhere during the event. It is hard to see any purely mechanical means for determining how many officers would be needed to direct traffic at the various intersections of differing routes and neighborhoods.

In any case, plaintiffs have offered no example of the sort of "formula" they have in mind. In the circumstances, it seems reasonable for the City to rely upon the experienced judgment of its Police Department to determine personnel and police vehicular needs for traffic control at a particular applicant's parade or march. We take judicial notice that traffic control is a major responsibility of local police departments around the nation. Rerouting and directing traffic around construction sites, accident scenes and the like are tasks the police regularly perform. The police, moreover, know the traffic patterns and problems along the different streets in their particular city and its neighborhoods. Augusta

could reasonably believe that its Police Chief and his staff had the expertise to estimate, case by case, the additional personnel and equipment needs for a traffic control detail established to handle traffic problems caused by a march on city streets. And once these needs are ascertained, the City's collective bargaining agreement provides objective pay information for determining overall costs.

In ruling that the ordinance provided insufficient standards, the district court refused to take into account Gregoire's affidavit that in determining the detail needed for plaintiffs' marches, he was guided by certain implementing criteria—criteria not unlike those a police officer said he considered for similar purposes in *Stonewall Union* v. *City of Columbus*, 931 F.2d 1130, 1135 (6th Cir. 1991). Speaking about the costs charged to plaintiffs, Gregoire stated that the size of the traffic control detail "is based only on factors which are completely unrelated to the message to be communicated by marchers" and includes the route to be taken, the duration of the route, the estimated number of people who will attend, whether marchers intend to close the entire road or only one direction of travel, and whether there are any other events or special circumstances within the City which could affect traffic.

We need not decide if Gregoire's affidavit should have been given weight here. Regardless, it is difficult to see that his stated criteria added much of constitutional import to what can be gleaned from the terms of the ordinance itself. *See supra*. An ordinance of this type must furnish "narrowly drawn, reasonable and definite stan-

dards" that are "reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'" *Thomas*, 534 U.S. at 324 (quoting *Forsyth County*, 505 U.S. at 133). We believe Augusta's ordinance furnished such standards quite apart from the matters Gregoire mentioned.

The parade ordinance directed the Police Department to calculate the costs of traffic control and clean up relative to the particular event for which a permit was sought. The making of a relevant professional judgment of this kind may properly be delegated to police and other officials. *See Kinton*, 284 F.3d at 26 (noting that "[p]ublic safety and convenience are paradigmatically permissible considerations in the issuance of permits" and judgments about public safety are inherently within the competence of permitting officials). The factors Gregoire listed in his affidavit for determining the size of the traffic control detail—the parade route, its duration, the estimated number of people who will attend, whether entire or partial road closure is involved, and whether there are other events or special circumstances affecting traffic—added few if any considerations that would not seem perfectly obvious to anyone asked to determine traffic control costs relative to a particular parade or march on city streets. And, as previously noted, the ordinance itself rules out charges that might be said to relate to the message "to be communicated by the marchers" by excluding altogether from the permit fee "the cost of police protection for public safety."

To be sure, the ordinance is terse; more extended glosses provided by written standing orders and the like might arguably be helpful in some way. But we believe the parade ordinance's fee provision affords, by itself, sufficient "narrowly drawn, reasonable and definite standards" so that the fee-setting decision is not left "to the whim of the administrator." *Thomas*, 534 U.S. at 324 (quotation omitted). Our duty is not to determine whether the ordinance meets ideal standards but whether it passes the constitutional threshold.

Plaintiffs, in addition to challenging the wording of the ordinance on its face for alleged absence of fee-setting standards, challenged the fee charged to Sullivan as being constitutionally excessive as applied. The district court agreed. Here, we believe, both appellants and the court are on firm ground. The district court found that Augusta charged Sullivan $478.55 more than the City's actual overtime payments to its officers for the March 20, 2004 march. The City's defense on appeal (apart from arguing the overcharge was so small as to be de minimis) is that it was offset by other expenses not charged plaintiffs by the City, such as the cost of Gregoire's time in processing Sullivan's permit application. The City, however, never purported to include this latter type of expenses in its calculation of traffic control costs. There is, moreover, no evidence to show what such other costs were. We agree with the district court that it was too late in the day for these supposed costs to be plugged into the present fee equation. A mistaken calculation of nearly $500 cannot in this context be considered de minimis.

Sullivan's overcharge was contrary to the ordinance's language limiting the fee to $100 "plus the *costs* of traffic control per city collective bargaining agreement and clean up" (emphasis supplied).[12] Amounts estimated in advance but never actually charged to the City are not a part of the "costs" of traffic control.

The Supreme Court has held that a government cannot profit from imposing licensing or permit fees on the exercise of a First Amendment right. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 113-14 (1993). Only fees that cover the administrative expenses of the permit or license are permissible. *Cox,* 312 U.S. at 577 (approving of a fee "limited to the purpose stated" of meeting "the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed"); *Citizens Action Group* v. *Powers,* 723 F.2d 1050, 1056 (2d Cir. 1983) ("Licensing fees used to defray administrative expenses

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[12] One way to guard against, or at least correct, a future overcharge of this sort would be to include in the parade ordinance a provision permitting some type of readily available administrative review process. Augusta's ordinance allows a parade permit applicant to appeal in writing to the City Council within five days if "the permit is denied or modified," § 13-5(g). But there is no explicit right to appeal from a fee overcharge. *See Forsyth,* 505 U.S. at 133 (noting with disapproval that administrator's fee decision was "unreviewable"); *Thomas,* 534 U.S. at 23 (noting with approval fact that the ordinance was "enforceable on review—first by appeal to the General Superintendent of the Park District . . . ."). The absence of an explicit review process for fee overcharge was not raised as a possible constitutional defect by plaintiffs and hence is not a matter for our consideration on appeal.

are permissible, but only to the extent necessary for that purpose."); *Fernandes* v. *Limmer,* 663 F.2d 619, 633 (5th Cir. 1981) (invaliding a $6 per day fee for permit to distribute religious literature in a municipal airport because of failure to restrict use of fee receipts to expenses of licensing process).

It is a violation of the First Amendment to have charged Sullivan more than the actual administrative expenses of the license, as set forth in the ordinance. Thus, although we find the standards for the permit fee to be sufficiently definite to pass constitutional muster, we uphold the district court's invalidation, as applied, of the excessive amount charged to Sullivan.

b. Thirty-Day Notice Requirement

The plaintiffs argued successfully below that the parade ordinance's requirement that applicants apply for a permit "[n]o less than thirty (30) days prior to an intended parade, march or other use of public ways within the City," coupled with authorization to the City Manager to "allow a shorter time frame for good cause shown" is not narrowly tailored and vests too broad discretion in City officials. We agree.

Notice periods restrict spontaneous free expression and assembly rights safeguarded in the First Amendment. People may, in some cases, wish to engage in street marches in quick response to topical events. While even in such time-sensitive situations, a municipality may require some short period of advance notice so as to allow it time to take measures to provide for necessary traffic control and other aspects of

public safety, the period can be no longer than necessary to meet the City's urgent and essential needs of this type. *American-Arab Anti-Discrimination Comm.* v. *City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) ("Any notice period is a substantial inhibition on speech."). Advance notice requirements that have been upheld by courts have most generally been of less than a week. *See, e.g., A Quaker Action Group* v. *Morton*, 516 F.2d 717, 735 (D.C. Cir. 1975) (two-day advance notice requirement is reasonable for use of National Park areas in District of Columbia for public gatherings); *Powe* v. *Miles*, 407 F.2d 73, 84 (2d Cir. 1968) (two-day advance notice requirement for parade is reasonable); *Progressive Labor Party* v. *Lloyd*, 487 F. Supp. 1054, 1059 (D. Mass. 1980) (three-day advance filing requirement for parade permit approved in context of broader challenge); *Jackson* v. *Dobbs*, 329 F. Supp. 287, 292 (N.D. Ga. 1970) (marchers must obtain permit by 4 p.m. on day before the march), *aff'd*, 442 F.2d 928 (5th Cir. 1971). Lengthy advance filing requirements for parade permits, such as the present thirty days, have been struck down as violative of the First Amendment. *See American-Arab Anti-Discrimination Comm.*, 418 F.3d at 605-07 (holding that provision requiring thirty days' notice is overbroad and is not saved by an unwritten policy of waiving the provision); *NAACP, Western Region* v. *City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984) ("[A]ll available precedent suggests that a 20-day advance notice requirement is overbroad."). Even five days has been held too long in certain circumstances. *See Douglas* v. *Brownell*,

88 F.3d 1511, 1523-24 (8th Cir. 1996) (city's asserted goals of protecting pedestrian and vehicular traffic and minimizing inconvenience to the public does not justify five-day advance filing requirement for any parade, defined as ten or more persons).

The City argues that its interest in having advance notice of a parade in order to control traffic, prevent scheduling conflicts, ensure adequate facilities are available, and assign personnel to safely close the streets is narrowly tailored. The City points out that its police force is relatively small, with only thirty-four officers available for assignment to parade details.[13]

But while those factors are entitled to due weight, applicants' First Amendment rights have countervailing strength, and these require the City in time sensitive situations to accommodate proposed parades and marches much more quickly than within thirty days. *See Church of the American Knights of the Ku Klux Klan* v. *City of Gary*, 334 F.3d 676, 682 (7th Cir. 2003) (noting "the reasonableness in general of requiring that a permit to hold a demonstration on city streets or other public property be sought in advance of the event," but observing that "the length of the required period of advance notice is critical to its

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[13] Citing *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316 (2002). the City points out that the Court upheld a Chicago ordinance allowing a total of up to 28 days for the Park District to grant or deny a permit application. However, the facts are not comparable to the present case, and the question of whether that time period was too lengthy does not appear to have been directly at issue in *Thomas*, *id.* at 323-34.

reasonableness; and given . . . that political demonstrations are often engendered by topical events, a very long period of advance notice *with no exception for spontaneous demonstrations* unreasonably limits free speech" (emphasis supplied)). Hence, while practical considerations, such as the scheduling of additional needed officers, will justify a short period of advance notice, a blanket rule requiring the permit application to be made in all cases no fewer than thirty days prior to an intended parade, march, or other use of public ways is not narrowly tailored and so violates the First Amendment.

While the above is clear, the City contends that its thirty-day rule is not blanket and that it has made a sufficient exception for the kind of spontaneous demonstrations mentioned above, as "[t]he City Manager may allow a shorter time frame *for good cause shown*" (emphasis supplied). The district court and plaintiffs, however, insist that the "good cause" standard is too vague and subjective to serve as a sufficient guide to the City Manager's discretion, and that the exception is, therefore, inadequate to establish the constitutionality of the advance notice requirement.

We think the exception does not save the unduly lengthy application period. If the "good cause" exception were attached to a reasonably short application period, we might rule otherwise. But as a device to cure a standard requirement of some thirty days, it is inadequate, requiring, as it does, that all persons desiring to seek a parade permit within some entitled shorter period shoulder the burden of convincing the City Manager of the existence of "good

cause." Such a requirement curtails an applicant's free speech rights, both because of the additional effort the applicant need make in order to claim those rights and the risk that the City Manager may not realize from the phrase "good cause" that many applicants will be entitled, routinely, to a shortening of the period.

It is true that Gregoire, in a supplemental affidavit, stated, "[a]s long as the Police Department is physically able to contact the officers and make the appropriate arrangements to close the road and have the appropriate traffic officers on duty, the City would not deny the permit based on the timing of the application." But the district court supportably ruled that Gregoire's supplemental statement is not shown to constitute a binding administrative interpretation or evince well-established practice.[14]

We affirm the district court's conclusion that the present thirty-day time period, as drafted, is unconstitutional for the reasons we have stated.

c. Meet and Attempt to Agree Provision

The plaintiffs argued below that the parade ordinance's requirement that "[w]ithin ten (10) days of applying for the permit, as a condition to its issuance, the applicant must meet with the Police Chief to discuss and attempt to agree on

[14] Nothing herein, of course, prevents the City from merely urging, as opposed to requiring, the submission of permit applications, when possible, within some longer advance period like thirty days, so long as it is clear that an applicant is bound only by a shorter period, as discussed.

the details of the route and other logistics," is not narrowly tailored to serve significant governmental interests because (1) forcing an in-person meeting with the police chief within ten days from applying for the permit creates an unreasonable time barrier that burdens unnecessarily a citizen seeking to promote a spontaneous or prompt demonstration in response to a time-sensitive issue or event; and (2) the details of the route may be an important part of the applicant's expressive activity and thus the applicant should not be required to negotiate with the government about the manner of expression. Plaintiffs also argued that applicants who are uncomfortable dealing directly with the police chief, such as an applicant wishing to protest alleged civil rights abuses by police, might be discouraged from applying for a parade ordinance altogether. The district court concluded that "the in-person meeting requirement chills substantially more speech than is necessary to achieve the end [of promoting public health and safety]."

The City argues on appeal that while the district court agreed there is a significant governmental interest in gathering information on parade logistics, it erroneously applied a least intrusive means analysis consistent with strict scrutiny, rather than the more relaxed narrow tailoring analysis appropriate in intermediate scrutiny. *Ward*, 491 U.S. at 797-98.

The City further contends that the most effective way to arrange a parade route with the police department is to do so in person and states that it has a policy of not rigidly adhering to the requirement of a face-to-face meeting if it is not

necessary to serve the stated purposes of the ordinance. The plaintiffs reply that there are no guidelines to suggest when such a waiver would be granted and that the supposed policy of not rigidly adhering to the meeting requirement (which the ordinance states is "a condition" to issuance of the permit) is unsupported by any written criteria, evidence of established practice, or specific precedent.

While the question is close, we believe the provision is overbroad in certain respects, especially given its unyielding language (the applicant "must meet with the Police Chief" and do so "as a condition to [the permit's] issuance"—the latter seeming to rule out the police department's alleged policy of not always requiring a face-to-face meeting). We agree with the City, however, that meeting face-to-face with the Police Chief is not an unreasonable way in most instances to work out a route, and that this requirement, as a general rule, is constitutionally acceptable, provided provision is made for reasonable exceptions. For one, it would seem necessary to allow for meeting with the Chief's delegate in case the chief is unavailable. For another, it may be unduly burdensome for a parade organizer who lives, or whose work takes him, some distance away from the City, to sit down with the Chief or his delegate. And there is the possibility that some activist leaders may experience the kind of acute discomfort that plaintiffs hypothesize at sitting down with the Chief because of the nature of their cause. All of these concerns, to a greater or lesser degree, suggest that in this age of e-mail, express mail, fax and telephone, requiring,

inflexibly, meeting with the Chief in person within the specified ten-day period as a mandatory condition of issuance of the permit burdens substantially more speech than is necessary. *Ward*, 491 U.S. at 799.

The City can address the problem in various ways. One way, of course, is simply to provide some acceptable alternatives to meeting with the Chief. Another would be to provide that an applicant may, if good cause existed, request an alternative, and the Chief or his delegate should allow the request if reasonable and practicable to do so. To take the above concerns into account is not equivalent to applying the inappropriate least-restrictive means test, *see Ward*, 491 U.S. at 797-98, but rather applies the principle that a regulation of this type may not burden substantially more speech than is necessary to further the government's legitimate interests. *Ward*, 491 U.S. at 799. Hence, one or more alternatives to a face-to-face meeting with the Chief need to be provided. Lacking such alternative or alternatives, the meeting provision as it currently stands is overbroad.

d. Absence of Waiver of Fees for Indigent

The plaintiffs argued below that the parade ordinance is unconstitutional on its face and as applied because it does not provide any exception or reduction to the potentially large permit fee for citizens or groups for whom the fee causes a substantial hardship. They argued successfully to the district court that the lack of a financial exemption leaves those citizens and groups

unable to pay the fee without "open, ample alternatives for communication." Where, as here, however, there are ample alternative forums for speech, we see insufficient justification for the district court's ruling that the Constitution mandates an indigency exception, in effect forcing general taxpayers to support financially a particular organizer's event.

i. District Court's Analysis

The district court relied on the Supreme Court's assertion in *Murdock,* 319 U.S. at 111, that "[f]reedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way." The district court observed that in cases where bonds and insurance premiums are required for a parade permit, courts have found that the requirements imposed financial demands that burdened the expressive activities of those with insufficient financial means more than necessary to achieve the governmental interest. The district court asked whether the sidewalks and parks of a city represent a reasonable alternative to the streets and concluded, based on the testimony of a sociologist called as an expert witness by the plaintiffs, that sidewalks have less symbolic significance than do streets and are inadequate as alternatives for logistical reasons.

Plaintiffs' expert witness was an assistant professor of sociology at Bowdoin College, who testified that sidewalks were not a satisfactory alternative location for parades. He testified, inter alia, that street marches attract more attention as they are more likely to inconve-

nience the general public by interrupting traffic and disrupting routines. He further testified that street marches also have positive connotations because of the American tradition of successful protest marches, such as the 1963 March on Washington. By contrast, he thought, sidewalk marches have less symbolic significance and provide logistical challenges because sidewalks are narrower and prevent the carrying of large banners.

The district court also expressed concern that Augusta's parade ordinance arguably requires the securing of permits for sidewalk marches as well as for street marches, despite the City's insistence that permits were not needed for sidewalk marches. The language of the ordinance refers to the "use of public ways within the city," which could, the district court said, easily be construed to include sidewalks.

ii. Analysis

We disagree with the district court's conclusion, and that of our dissenting colleague, Judge Lipez, that sidewalk marches and other alternatives to street marches are so lacking as to necessitate an indigency exception to the parade permit fee. We also find no reason to reject the City's insistence that sidewalk parades do not require permits under Augusta's parade ordinance. In a case not unlike the present, the Sixth Circuit similarly concluded that an indigency exemption or waiver was not required for a parade ordinance where, as here, the sidewalks and parks of the city were available without charge for related speech activities. *Stonewall*, 931 F.2d at 1137. The Sixth Circuit stated,

"Because we believe the availability of the sidewalks and parks provides a constitutionally acceptable alternative for indigent paraders, we find that the lack of an indigency exception does not render the ordinance constitutionally invalid." *Id.* We agree with that analysis and find the situation in Augusta analogous. Plaintiffs have cited several circuit and district court cases in support of their contrary position, but these, of course, are not binding upon us and are, moreover, largely distinguishable.[15]

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[15] The district court cited *Cent. Florida Nuclear Freeze Campaign* v. *Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985), which held a city ordinance unconstitutional in part because there was no provision exempting indigents from paying the cost for police protection, but that case also found that "alternative means of exercising First Amendment rights" were not available, which is not the case here. *Invisible Empire of the Knights of the Ku Klux Klan* v. *Town of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988), which found that the requirement of reimbursing the town for police protection and cleanup was unconstitutional because it was not "waived or modified for indigents" relied on *Walsh* for its holding. Both cases were decided before *Forsyth*, which emphasized that a license fee that was more than "nominal" was not inherently unconstitutional. 505 U.S. at 136-7. *Wilson ex rel U.S. Nationalist Party* v. *Castle*, 1993 WL 276959 at *4 (E.D. Pa. July 15, 1993), holding that an insurance requirement was not narrowly tailored as applied to persons "who are financially and otherwise unable to obtain coverage," involved an insurance requirement, which implicates issues of viewpoint discrimination as an insurance company may charge more depending on the group being covered, and a strict scrutiny analysis not applicable here. Likewise, in *Invisible Empire Knights of the Ku Klux Klan* v. *City of West Haven*, 600 F. Supp. 1427, 1435 (D. Conn. 1985), holding a bond requirement unconstitutional as applied to those who could demonstrate their inability to obtain a bond, the case

1. Ample Alternatives

Augusta argues that it provides numerous alternative avenues of communication to persons unable to afford a parade permit, including (a) use of sidewalks, (b) gatherings on state land such as the statehouse steps (Augusta is the state capital), (c) hand-held banners or signs, (d) leafleting, (e) vehicular processions, and (f) mass outdoor gatherings of fewer than 200 people.

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involved the potential of a viewpoint discriminatory "heckler's veto" in the application for a bond and thus implicates issues not at play here. Plaintiffs additionally rely on *E. Conn. Citizens Action Group*, 723 F.2d at 1056-57, which was also decided before *Forsyth* and held that the defendant government agency could not charge an administrative fee for the sole purpose of deterring frivolous requests but rather could charge the fee only to the extent it could demonstrate "its necessity as a means of offsetting expenses associated with processing applications for access to property under its control." Likewise, the plaintiffs' reliance on *Lubin* v. *Panish*, 415 U.S. 709, 718 (1974) is inapplicable here where the Court found that "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." The plaintiffs here have alternate means of expressing their views in the city of Augusta. The case perhaps most helpful to the plaintiffs is *Van Arnam* v. *GSA*, 332 F. Supp. 2d 376, 406 (D. Mass. 2004), where the district court, relying on several of the above cases, held unconstitutional an indemnification/hold harmless requirement on the grounds that the absence of an indigency waiver suppressed more speech than was necessary and thus was not narrowly tailored. 332 F. Supp. 2d at 406. The analysis did not thus turn on the availability of alternative means of expression (which the district court had found were available). To the extent that the two cases are comparable, we disagree with the narrow tailoring conclusion in *Van Arnam*.

None of these alternatives requires payment of a fee, and only one—a rally on the state house steps—requires a permit, which is freely obtained.

Although the district court acknowledged the alternatives offered by the City, it believed the sidewalks—an alternative especially emphasized—were insufficient because they are too narrow and marginal as compared with main streets, thereby perhaps dampening the number of protestors able to march and the amount of attention attracted. But while a sidewalk march might, for these and other reasons, seem less appealing to some protestors than a street march, it nonetheless provides a prominent route along major thoroughfares for dissemination of a message. As Gregoire stated in his affidavit, several groups have used sidewalk marches to engage in expressive activities, indicating the availability of the sidewalk alternative and its appeal to some persons.

Further, as in *Stonewall,* the availability of gathering places for protests, here including especially the state house steps, with its potential for media coverage, demonstrates the ample range of speech alternatives in the City. "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate," *Members of City Council of City of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789, 812 (1984) (citation omitted), but an ordinance does not fail for lack of adequate alternatives so long as there are avenues for "the

general dissemination of a message." *Frisby*, 487 U.S. at 483-84 (ban on picketing in public forum upheld where alternatives included entering neighborhoods alone or in groups, going door-to-door, distributing literature through the mails, or contacting residents by telephone).

This Circuit has upheld in other contexts alternative means of communication despite diminution in the quantity of speech, a ban on a preferred method of communication, and a reduction in the potential audience. *Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175, 192-94 (1st Cir. 1996) (holding that a ban on newspaper boxes in historic district met the intermediate scrutiny test in that it was narrowly tailored and newspapers had ample alternative channels of communication in the same area); *see also D.H.L. Assocs., Inc.* v. *O'Gorman*, 199 F.3d 50, 59 (1st Cir. 1999) ("The essence of this question is not 'whether a degree of curtailment' of speech exists, but rather 'whether the remaining communicative avenues are adequate.'" (quoting *Nat'l Amusements*, 43 F.3d 731, 745 (1st Cir. 1995)). In upholding a ban on newspaper boxes in the historic Beacon Hill neighborhood of Boston, we concluded, "The First Amendment does not guarantee a right to the most cost-effective means of distribution or the rentfree use of public property." *Globe Newspaper Co.*, 100 F.3d at 193.

The plaintiffs have access to numerous speech alternatives, making a fee waiver to march in the streets unnecessary. Before ending the inquiry, however, we address the district court's reference

to the possibility that sidewalks might themselves be subject to a parade permit requirement.

2. Free Availability of Sidewalks

The district court's conclusion that sidewalk marches "at least arguably" may be subject to permitting (and thus subject to attendant fees) is not unreasonable based simply on the language of the ordinance, but it contradicts the overwhelming evidence in the record that Augusta does not interpret, and has not interpreted, its own parade ordinance in this manner. Gregoire testified in his March 2004 affidavit that sidewalk marches are free and require no permit. In his 2005 supplemental affidavit, he said he had informed Sullivan of that fact in anticipation of the planned March 2004 protest and offered to assist his group with a free sidewalk march prior to the start of the instant litigation. Though certain other of Gregoire's proffers of limiting constructions regarding other provisions of the parade ordinance, *supra,* came too late or were too vague to be considered authoritative interpretations, his interpretation of the sidewalk marches is one apparently followed by the City from before the litigation. Gregoire's supplemental affidavit in 2005 listed seven permit-fee and fee-free sidewalk marches which had taken place in the previous year, indicating a well-established practice of allowing sidewalk marches without requiring a permit or a fee. We accordingly disagree with the district court's suggestion that sidewalk marches might be excluded as genuine alternatives for persons unable to afford a permit to march on city streets.

It is obviously not simple to select out those people and causes whose indigency is such as to warrant giving them, as it were, a free pass. Such provisions for indigency exceptions do exist in the ordinances of some cities, e.g., Pittsburgh, Minneapolis, and Los Angeles. Whether a particular city, like Augusta, wishes to enact and deal with the administration of such an exception is up to it and its government. Our conclusion is simply that there are sufficient alternatives for speech as not to require, constitutionally, that Augusta provide an indigency exception here.

In all events, the Supreme Court has addressed the question of parade permit fees in some detail in *Forsyth*. It has not suggested that an indigency exception is constitutionally required. If one is to be created under the aegis of the First Amendment, surely that is for the Supreme Court to decide in the first instance. There is a vast number of areas in which a lack of funds may disadvantage an individual, and a constitutional determination that in civil matters an indigent need not pay costs ordinarily imposed on others is a matter to be approached with some caution.

e. Abstention and Saving Constructions

The district court observed that it did not take lightly its conclusion that the ordinances at issue here are unconstitutional. It dismissed the possibility of abstention or certification to the state court, however, because the resolution is not "fairly subject to an interpretation which will render unnecessary or substantially modify the

federal constitutional question." *Bd. of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 575-76 (1989). A district court's abstention ruling is reviewed on appeal for abuse of discretion. *Sheerbonnet, Ltd.* v. *American Express Bank*, 17 F.3d 46, 48 (2d Cir. 1994). The court did not abuse its discretion here in declining to abstain or certify any of the issues to the state court.

D. Conclusion

We ***affirm*** the district court's determination that sections 13-5(a), to the extent that it requires thirty days' advance notice, and 13-5(c), to the extent that it requires a permit applicant to meet with the Police Chief, are unconstitutional; and ***reverse*** the district court's invalidation (for grant of excessive discretion) of 13-5(e), the fee provision. We ***affirm***, however, the district court's holding that the $478.55 fee overcharge to Sullivan was unconstitutional. We ***reverse*** the district court's determination that plaintiffs had standing to challenge the MOGO and that the absence of an indigency requirement in section 13-5(e) is unconstitutional. We ***vacate*** the district court's rulings that provisions of the MOGO are unconstitutional. Each side shall bear its own costs.

– Dissenting Opinion Follows –

LIPEZ, *Circuit Judge*, dissenting in part. I agree with Judge Campbell's excellent opinion in all but one respect. Because there is a world of difference between marching down the main street of a city and being confined to a sidewalk or park to communicate one's message, I do not agree that the City's parade ordinance complies with the First Amendment without an indigency exception. All citizens, not only those who can afford the cost of traffic control, have a right to express their views on matters of public concern in the most powerful of our nation's traditional public fora. *See Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943) ("Freedom of speech . . . [is] available to all, not merely to those who can pay their own way."). Therefore, I respectfully dissent from that portion of the majority opinion allowing Augusta to impose parade permit fees without regard to an applicant's ability to pay.

I.

A. Fundamental Rights and Indigents

The right to free speech embodied in the First Amendment is a fundamental constitutional guarantee, and access to public spaces to speak on matters of public concern has long been a concomitant privilege of the right of expression. The Supreme Court has recognized that use of the streets and other public places has

> from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. . . . [S]treets and parks . . . have immemorially been held

> in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.); *see also Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("Having availed itself of the public thoroughfares 'for purposes of assembly [and] communicating thoughts between citizens,' the [petitioner] is engaged in a use of the streets that has 'from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.'") (quoting *Hague*, 307 U.S. at 515); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (noting that streets and parks are "[a]t one end of the spectrum" among "places which by long tradition or by government fiat have been devoted to assembly and debate").

In this case, plaintiffs claim that their access to the "public streets, the quintessential traditional public fora," *Int'l Soc. for Krishna Consciousness* v. *Lee*, 505 U.S. 672, 676 (1992) (citation omitted), may not be denied based on their inability to pay the required fees. In many contexts, disparities attributable to wealth are not of constitutional significance. *See Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988) ("We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny."). Nevertheless, in multiple settings involving fundamental rights, the Supreme Court has held

that it is unconstitutional to deny access to indigents. *See, e.g., M.L.B.* v. *S.L.J.*, 519 U.S. 102, 114-16, 123-24 & n.14 (1996) (striking down Mississippi statute conditioning appeal of order terminating parental rights on advance payment of court fees and noting that "fee requirements ordinarily are examined only for rationality" but that exceptions have been made under equal protection principles when a "fundamental interest [is] at stake"); *Lubin* v. *Panish*, 415 U.S. 709, 718 (1974) ("[I]n the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay."); *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971) (relying on due process principles to hold that the State may not deny a divorce to a couple based on inability to pay court costs); *Griffin* v. *Illinois*, 351 U.S. 12, 17-19 (1956) (relying on due process and equal protection principles to invalidate a state requirement that a defendant pay for a trial transcript as a prerequisite to appeal and holding that an indigent defendant has an equal right of access to appellate review of a conviction where a State generally affords such review); *cf. Kadrmas*, 487 U.S. at 465 (rejecting plaintiffs' claimed entitlement to free school bus transportation because "the statute challenged in this case discriminates against no suspect class and interferes with no fundamental right").

In concluding that some degree of public subsidy is necessary in these contexts, the Court relied on equal protection or due process princi-

ples, or both,[16] and applied heightened review because of the fundamental interests at stake. *See M.L.B.*, 519 U.S. at 115-16 (noting that, "[a]bsent a fundamental interest or classification attracting heightened scrutiny, . . . the applicable equal protection standard 'is that of rational justification' ") (quoting *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973) (per curiam)). Under such heightened review, "the State's need for revenue to offset costs" was insufficient justification for denying equal access to individuals of limited economic means. *See M.L.B.*, 519 U.S. at 123.

The Court's discussion in *M.L.B.* sheds light on the nature of the rights triggering heightened scrutiny of government fees. There, the respondents had asserted that prior case law established that the government " 'need not provide funds so that people can exercise even fundamental rights' " and argued that a subsidy for the *M.L.B.* parent would conflict with cases "recognizing that the Constitution 'generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.' "

[16] The dual rationale arises in the judicial access cases, where the due process concern relates to the "essential fairness of the state-ordered proceedings anterior to adverse state action" and the equal protection concern "relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs." *M.L.B.*, 519 U.S. at 120. However, Justice Ginsburg noted in *M.L.B.* that most of the decisions used an equal protection framework. *Id.*

519 U.S. at 124-25 (citation omitted).[17] In response, the Supreme Court distinguished the cited cases as involving efforts to obtain "state aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action." *Id.* at 125.

The plaintiffs here neither claim entitlement to benefits the state has made available in limited circumstances—such as tax breaks or Medicaid funding—nor otherwise invoke an "affirmative right" to governmental assistance to meet personal needs or private concerns. To the contrary, they invoke an explicit constitutional right to speak in a forum that the government holds in trust for just such a purpose. Their claim to this forum implicates core First Amendment values. The plaintiffs sought to speak on matters of public concern relating to national and international affairs. "[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection," *Connick* v. *Myers,* 461 U.S. 138, 145 (1983) (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey* v. *Brown,* 447 U.S. 455, 467 (1980)). The First Amendment's explicit right

[17] Among the cases cited were *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540 (1983), which rejected a nonprofit organization's claims, on First Amendment and equal protection grounds, that they were entitled to receive tax deductible contributions to support their lobbying activity, and *Harris* v. *McRae*, 448 U.S. 297 (1980), which held that women seeking medically necessary abortions were not entitled to Medicaid funding.

"peaceably to assemble" lends further weight to their interest in a public gathering to address common concerns. *See, e.g., Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) (noting that regulation of use of the streets implicates "the right of assembly and the opportunities for the communication of thought and the discussion of public questions").

Moreover, public speech is not a self-centered pursuit; it is speech *for* "the public." Any assumption that the speaker is the primary beneficiary when he uses a public forum is incorrect:

> This assumption ignores the benefit of the speaker's activities for the entire society. His activities are part of the process by which a democratic society makes informed decisions. He speaks so that society can listen and decide for itself.

David Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 Tex. L. Rev. 403, 413 (1983) (hereinafter "Goldberger"). An individual who seeks a permit to disseminate a message about matters of public concern in a traditional public forum is thus exerting free speech rights that not only are explicitly promised by the Constitution but also are of value to the community as a whole. Where such communal benefits exist, the government's countervailing interest in recouping costs solely from the individual is weaker.

First Amendment rights are not absolute, however, and indigency does not alter that principle. As the majority explains, the government may

impose reasonable time, place and manner restrictions on the exercise of First Amendment rights, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."); *Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175, 186 (1st Cir. 1996). I therefore must consider whether the fee requirement in the parade ordinance satisfies this three-part inquiry.

The first prong is easily met here. It is undisputed that Augusta's parade ordinance is content neutral. On its face, the ordinance also is narrowly tailored to serve the government's recognized interest in recovering the costs of administration, traffic-control and clean-up associated with parades held on public streets. *See Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 136 (1992) ("[R]aising revenue for police services . . . undoubtedly is an important government responsibility . . . ."); *Cox*, 312 U.S. at 576 (approving fees limited to administrative expenses and "'to the maintenance of public order in the matter licensed'") (quoting state court's construction of the challenged statute). As

discussed above, however, such fees are subject to heightened review in the context of First Amendment rights. *See M.L.B.*, 519 U.S. at 115-16; *Casey* v. *City of Newport*, 308 F.3d 106, 110-11 (1st Cir. 2002). They cannot survive such scrutiny if individuals unable to pay the fees would be denied an adequate public forum for speaking on issues of public importance—the concern addressed by prong three of the time, place and manner inquiry.

Plaintiffs' claim that they are constitutionally entitled to a fee waiver thus turns on whether the City offers an adequate alternative to a street march for disseminating a message that concerns a public issue.[18] As I shall explain, I share the district court's view that the options proffered by the City fall short of the constitutional standard. *See Sullivan* v. *City of Augusta*, 406 F. Supp. 2d 92, 126 (D. Me. 2005).[19]

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[18] My analysis considers only speech on matters of public concern, the type of expression for which the plaintiffs in this case sought parade permits.

[19] The majority opinion notes that, despite the Supreme Court's consideration of parade permits in some detail in *Forsyth*, the Court did not there "suggest[] that an indigency exception is constitutionally required." The indigency issue was not before the Court in *Forsyth*. The Court granted certiorari in *Forsyth* "to resolve a conflict among the Courts of Appeals concerning the constitutionality of charging a fee for a speaker in a public forum." 505 U.S. at 129. The five justices in the *Forsyth* majority bypassed the question of the permissible size of a fee, concluding that the challenged ordinance was invalid because it lacked procedural safeguards and tied the fee to the content of speech. *Id.* at 137.

B. The Adequacy of the Available Alternatives

In finding that Augusta offered plaintiffs no adequate alternatives to a street march, the district court concluded that the parade ordinance arguably embraced sidewalks as well as streets. I agree with the majority that the ordinance should not be read in that manner. The City's past practice sufficiently demonstrates that the ordinance does not extend to sidewalks and that sidewalks are thus an available free alternative to the streets, along with parks and the Statehouse steps. The question thus becomes whether streets provide such a unique forum for the communication of views that other public fora, including sidewalks, cannot be deemed adequate alternatives.

That assessment necessarily requires an examination of the speaker's objectives—both in terms of the message she wishes to communicate and the audience she seeks to reach. Still, the match between the desired forum and a substitute need not be perfect: " '[T]he lens of inquiry must focus not on whether a degree of curtailment exists, but on whether the remaining communicative avenues are adequate.' " *Globe Newspaper,* 100 F.3d at 193 (quoting *Nat'l Amusements, Inc.* v. *Town of Dedham,* 43 F.3d 731, 745 (1st Cir. 1995)).

In assessing adequacy, we have been particularly sensitive to the ability of a party to disseminate its message to the same general audience despite the restrictions at issue. In *Globe Newspaper,* we considered the validity of a

ban on newsracks in the Beacon Hill Historical District of Boston. 100 F.3d at 178. We noted that the regulation did not prevent the plaintiff newspapers from selling their publications in the District by means of street vendors, thereby accomplishing their objective "in the very public forum—the District's sidewalks—from which the newsracks are banned." 100 F.3d at 193.

The Supreme Court reached a similar conclusion in *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), which involved a challenge to an ordinance banning all posted signs, including political campaign posters, in the City of Los Angeles. The Court found that the ban did "not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs . . . is prohibited." *Id.* at 812. Similarly, in *National Amusements*, we upheld a town bylaw prohibiting the showing of movies between 1 a.m. and 6 a.m. despite the appellant's assertion that the regulation "foreclose[d] the opportunity to communicate its message to a distinct segment of the movie-going public"—those who would attend only a midnight showing. 43 F.3d at 745. Although we acknowledged that the bylaw would "diminish[] the total quantity of appellant's speech in some measure, and simultaneously curtail[] its opportunity to communicate" with patrons who preferred midnight shows, we concluded that "thwarting such an idiosyncratic preference cannot be equated with a denial of adequate avenues of communication." *Id.* In each of these cases, while some potential recipients of

the message may have been missed, the message could still reach the intended audience.

In this case, plaintiff Sullivan sought a parade permit in February 2004 on behalf of a group known as the March for Truth Coalition, which advocates the "worldwide end of war and empire-building" as well as social and economic reform. Plaintiff Dansinger sought a permit to hold a peace march and rally in conjunction with the Million Worker March to be held in Washington, D.C., in October 2004.[20] Both proposed parades were thus aimed at shaping public attitudes about matters of public policy—the type of political speech that long has been associated with street marches.

Of the available free alternatives, it is easy to conclude that parks and similar fixed sites where speakers may congregate are not adequate alternative locations for achieving the objectives of street marches. A stationary gathering whose message will be delivered to only the finite group

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[20] Plaintiffs' Statement of Material Facts reported that Sullivan sought to participate in the march "as a way of expressing his opposition to the war in Iraq and as a way of publicly advocating the need for affordable health care, veterans' rights and benefits, and living wage jobs, and as a way of associating himself publicly with individuals and groups who share his views." According to the Statement, Dansinger sought to march "as a way of expressing his opposition to the war in Iraq, supporting the Million Worker march and publicly advocating the need for economic justice in America, and to associate with others to advocate effectively for those goals."expressing his opposition to the war in Iraq, supporting the Million Worker march and publicly advocating the need for economic justice in America, and to associate with others to advocate effectively for those goals."

of non-participants who also happen to be in that spot or travel by it is considerably different from a march that inevitably will come into contact with waves of outsiders. A march down Main Street will display the message to pedestrians, business owners, customers, and even motorists who encounter the periphery of the procession while being re-routed. Although television and newspaper coverage could enlarge the audience for a stationary protest, that possibility depends on the editorial judgments of the media, and any message actually disseminated would be both limited in scope and lacking the immediacy of personal contact. If plaintiffs' objective had been to demand that state legislators take particular action on pending legislation, the City's assertion that the Statehouse steps were an adequate alternative would have more force. Plaintiffs, however, sought to persuade as many members of the public as they could reach to join their efforts to advocate for changes in public policy.

In finding that the City could not constitutionally "block indigents from using the public streets to convey their message," the district court relied on the opinion of plaintiffs' expert, Joe H. Bandy, III, a sociology professor at Bowdoin College with a special expertise in the study of social movements. *See Sullivan*, 406 F. Supp. 2d at 124-25. Professor Bandy confirmed the superiority of "moving speech" for communicating a political message:

> With a march that moves through public streets, the demonstrators can bring their protest message to a variety of dif-

> ferent audiences, audiences that are not a part of the activists' direct constituency but the broader public. . . . [B]y protesting through a format that moves through different public spaces, a march is more likely to gain the attention of the media and political leaders than if the demonstration were localized in one area that did not inconvenience the general public in some way.

Bandy Declaration, 1/20/05, at 3, App. at 111.

While large gatherings in public places can sometimes attract similar attention, the force of a message conveyed by the more typical small protest group will be much greater if the group is marching down the city's main thoroughfares, displacing other people's daily routines, than if it is confined to a park or the Statehouse steps. *See* Gary Wiseman, Note, *Paying for Free Speech: The Continuing Validity of Cox v. New Hampshire*, 64 Wash. U.L.Q. 985, 988 n.16 (1986) (hereinafter "Wiseman") ("In the absence of spectators, even the most exciting demonstration lacks force."). Therefore, when a speaker seeks to motivate the general public about a matter of public policy, the opportunity to communicate from a fixed location will rarely be an adequate substitute for a march down city streets.

Sidewalks, however, present a closer question. Like the street march, a sidewalk march provides access to a constantly changing audience that will likely include many of the same individuals who would observe a procession moving down the middle of the street. Although the City notes that

a sidewalk procession would be viewed by more motorists than a street march because the streets would be open and cars would be able to travel directly past the procession, that theoretical advantage is illusory. Such motorists will of necessity be focused on traffic conditions and will be unable to give other than incidental attention to the parade.[21]

Moreover, it is not only the size of the crowd on the sidelines that affects the message being conveyed. If a march is confined to the sidewalks, the perception that space is limited, and that fewer marchers can therefore be accommodated, will reduce the number of participants. The district court reasonably accepted appellees' assertion that safety concerns "may deter some would-be participants" from joining a sidewalk march because of the need to cross traffic and the lesser police presence. *Sullivan*, 406 F. Supp. 2d at 125. Indeed, such concerns are likely to suppress the number of spectators as well, with shoppers and others altering their routes to avoid the sidewalk congestion. The resulting reduction in the number of marchers, as well as spectators, dilutes the message that is delivered:

> [B]y reducing the number of participants or spectators, a speaker forfeits other advantages of size. A mass demonstra-

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[21] Mass marches alongside well traveled roads also have a long history and can have dramatic communicative effect. *See, e.g., Williams* v. *Wallace*, 240 F. Supp. 100, 104-05, 107-08 (D.C. Ala. 1965) (describing disrupted Selma-to-Montgomery voting rights march on March 7, 1965, and proposal for a subsequent march later that month).

> tion "conveys an image of power to bystanders and participants alike, reinforces the group's commitment to its cause, . . . and appears to circumvent the elite's power to control mass communication."

Wiseman, 64 Wash. U.L.Q. at 988 n.16 (quoting Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1, 41 n.7); *see also* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 297 (1985) (hereinafter "Neisser") ("[T]hose who hold unpopular, unknown, or unrepresented views can express the strength of their position (when allowed in the public marketplace of ideas) only through their numbers.").

Street marches have the distinct advantage of allowing more participants to march side-by-side, giving the demonstration—and its message—a more commanding presence. Professor Bandy observed that the narrowness of sidewalks can affect both the logistics of a march and the strength of the message: "[A]s a matter of logistics, having a large number of people file in a very narrow pathway would make a more snake-like procession rather than a mass rally procession. This narrowing of the demonstration would likely dampen the message because the demonstration would not look as large to passers by or the media." *See* Bandy Declaration at 5, App. at 113.

The large signs and banners we have come to expect as part of a parade cannot be displayed

across the narrower width of a sidewalk, and the logistical difficulty of carrying such oversized messages front-to-back along the edge of the sidewalk undoubtedly would discourage their use. No matter how long the procession, a small band of protesters carrying small signs simply does not communicate the same dramatic image of massive support as a crowd walking six or eight abreast carrying street-wide signs. Thus, excluding speakers from the streets does not simply relocate their message. The strength of the message is measurably diminished by the perception that it lacks support from the "masses." *See* Bandy Declaration at 5, App. at 113.[22]

While the numbers—both real and perceived—are important, they are not the only relevant factor. The tradition of a parade as a public event means that a street march commands our attention in a way that a sidewalk procession does not. As a community, we look forward to parades, we are attentive to them, and we interrupt our everyday lives to accommodate them. A parade is a significant community event—whether its purpose is to recognize Irish heritage on St. Patrick's Day, to celebrate a sports championship, or to express gratitude to soldiers on Veterans Day. A marcher confined to the sidewalk is thus denied the public forum that we historically have used to express our collective sentiment. *See* Timothy Zick, *Space, Place, and Speech: The Expressive*

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[22] From a case-specific perspective, the sidewalk option here was particularly limiting. Deputy Police Chief Gregoire stated in his deposition that the sidewalks along the appellees' proposed parade route had room for two, perhaps three, people of average size to walk side-by-side.

Topography, 74 Geo. Wash. L. Rev. 439, 460 (2006) (hereinafter "Zick") ("In terms of communicative behavior, place is as critical to expressive experience as voice, sight, and auditory function.").

Moreover, in recent decades, streets have acquired powerful symbolism as a forum for protest and political expression. The images of 1960s civil rights activists marching through the streets remain vivid, and those marches continue to inspire the current generation of street protests on matters of global importance—including racial injustice, war and peace, and the inattentiveness of a community to its poor. *See, e.g., Iraq Vets Lead Syracuse March,* People's Weekly World, Oct. 11, 2007 (describing September 2007 march through streets of Syracuse, N.Y., by more than 2,500 peace activists, including members of Fort Drum chapter of Iraq Veterans Against the War); *Rallies Support Jena Teens,* San Jose Mercury News, Sept. 21, 2007 (from New York Times news service) (describing a "slow-moving march that filled streets, spilled onto sidewalks and stretched for miles," with more than 10,000 demonstrators, protesting the treatment of six black Louisiana teenagers arrested in the beating of a white classmate); *Janitors to March for Pay Increases,* San Mateo County Times, June 14, 2007 (describing planned street march by "[t]housands of Silicon Valley janitors" from East Palo Alto to "the heart of Palo Alto's affluent downtown" as part of International Justice for Janitors Day); *Demonstrators to Turn Out for Immigration Reform,* Denver Rocky Mountain News, May 1, 2007 (reporting that "Denver and

other cities across the nation will host another round of ~~marches~~ today to demonstrate that the campaign for immigration reform is still under way"). Indeed, "taking it to the streets" is itself part of the activist message, i.e., that ordinary people have the power to take over the public way in their pursuit of social change. *See* Zick, 74 Geo. Wash. L. Rev. at 471 ("Parades, protests, and demonstrations are . . . akin to temporary appropriations of the streets. They express specific social and political messages and give public voice to sentiments about existing power relations.").

Sidewalk protests, by contrast, are commonly associated with more particularized dissent. A sidewalk demonstration is often linked to a specific business or institution, focusing attention on what is occurring at that moment at that place—targeting, for example, a business that refuses to serve or hire members of minority groups, an abortion clinic, or an employer engaged in a labor dispute.

There are exceptions, of course. As the City points out, the civil rights movement used sidewalk marches on multiple occasions during the 1960s. The successful Selma-to-Montgomery voting rights march along Highway 80 in late March 1965 could not have been more powerful if the thousands of marchers had been walking down the middle of the road. Although such marches had enormous impact during an extraordinary time in our country's history, when equal rights demonstrators had widespread support and the world's attention, the fact remains that a sidewalk march is usually an inadequate substitute

for the streets when the message to be disseminated is unrelated to a specific locale.

The stakes in access to the free public forum have also become higher as other methods for reaching mass audiences have grown more expensive and out of reach for the average citizen.

> [A]ll speakers cannot gain access to all forums. For example, many speakers cannot afford television or radio broadcasting time, and speakers espousing unconventional views may find the mass media unreceptive. For this reason, public streets and parks, which are accessible to speakers regardless of their financial resources or media appeal, are vitally important public forums. Maintaining free access to public streets and parks helps insure a market composed of a wide range of competing ideas.

Wiseman, 64 Wash. U. L. Q. at 986 (footnotes omitted); *see also Santa Monica Food Not Bombs* v. *Santa Monica*, 450 F.3d 1022, 1036 (9th Cir. 2006) ("As traditional public fora, parks, sidewalks, and streets 'provide a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards.' Those fora must not be regulated too restrictively, lest they become unavailable to those who have little or no recourse to other, often costly, areas for public discourse.") (citation omitted)); Bandy Declaration at 7, App. at 115 ("[S]ocial movements have none or very few alternative methods to communicate their message other than low-cost demon-

strations in public spaces and streets."); Neisser, 74 Geo. L.J. at 297.[23]

Although the internet has provided new fora for communicating with large numbers of people, websites, blogs and other publicly accessible online opportunities are not substitutes for the face-to-face experiences that have, "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *See Menotti* v. *Seattle,* 409 F.3d 1113, 1174 (9th Cir. 2005) (Paez, J., concurring in part and dissenting in part) (" '[T]here is no internet connection, no telephone call, no television coverage that can compare to attending a political rally in person. . . .' Public protests are at the heart of the First Amendment and are critical for incubating civic engagement and encouraging spirited debate." (quoting *Hodgkins* v. *Peterson,* 355 F.3d 1048, 1063 (7th Cir. 2004)); Thomas P. Crocker, *Dis-*

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[23] Professor Neisser also noted the importance of ensuring free public fora:

> The first amendment may not mandate or even tolerate affirmative government action to overcome the disparities in communicative effectiveness wrought by the marketplace's pricing structure and the differing financial resources of competing groups. Yet, if the first amendment is to assure a safety valve for dissatisfaction, genuine discussion of public policy, ascertainment of new scientific truths or cultural forms, and individual self-development, the public system of expression must, at a minimum, avoid replicating the private market's price structure and thereby reinforcing its inequities.

74 Geo. L. J. at 297 (footnotes omitted).

placing Dissent: The Role of 'Place' in First Amendment Jurisprudence, 75 Fordham L. Rev. 2587, 2590 (2007) ("[T]he Internet does not provide for serendipitous occasions to encounter others face-to-face or to discover the new or the strange in both a social and public setting."); Zick, 74 Geo. Wash. L. Rev. at 484 ("There is no question that an abundance of speech takes place in these new places; but courts must recognize that this speech is qualitatively and, quite often, quantitatively different from speech in real places."). The streets thus remain the only publicly accessible forum that offers speakers both the immediacy of personal contact and—in contrast to sidewalks—the realistic potential for attracting a large audience and widespread attention with a powerful message undiluted by space constraints.

To be sure, the Constitution does not guarantee every speaker her forum of choice. *See, e.g., Heffron* v. *Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981) ("It is [] common ground . . . that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). As noted earlier, an alternative need not have precisely the same impact to be "ample," *see Taxpayers for Vincent*, 466 U.S. at 812; *Globe Newspaper*, 100 F.3d at 193. However, under any meaningful standard of heightened review, that alternative forum cannot be ample if it lacks the qualities that make the streets a uniquely powerful forum for expression, and thereby leaves indigent speakers and the public they seek to influence with a substantially different and

diminished First Amendment experience. In upholding the sign ordinance in *Taxpayers for Vincent*, the Court concluded that there was "no reason to believe" the expressive benefits of posting signs on public property could not be obtained through other means. 466 U.S. at 812. Noting the absence of a traditional right of public access to utility poles for purposes of communication "comparable to that recognized for public streets and parks," *id.* at 814, the Court observed:

> Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.

Id. at 812.

Here, by contrast, we are considering access to "'[t]raditional public forum property,'" which "'occupies a special position in terms of First Amendment protection,'" *id.* at 813 (quoting *United States* v. *Grace*, 461 U.S. 171, 180 (1983)). And, as I have described, the communication difference between the streets and sidewalks is substantial, despite their physical proximity. A speaker whose march may proceed down the middle of Main Street has numerous advantages—larger numbers of spectators and participants, the space to accommodate bolder and bigger

signs, the focused attention drawn by a parade, and the symbolic power of "taking it to the streets."

This case implicates what *Taxpayers for Vincent* did not: "a uniquely valuable or important mode of communication," 466 U.S. at 812, that has "immemorially been held in trust for the use of the public," *Hague*, 307 U.S. at 515. Because a message communicated in the streets is uniquely powerful, a speaker in Augusta who is unable to pay the permit fee to hold a street march has no adequate alternative. That fee barrier is particularly unacceptable given the government's role as trustee for the public in providing safe access for expressive and other uses of the streets. *See Cox*, 312 U.S. at 574. Consequently, the Constitution requires that the city's parade ordinance include an indigency exception.

II.

The City maintains that providing a fee exception for indigents would be virtually impossible to administer. Without minimizing the challenges of designing and implementing such a system, there is experience to the contrary. Other cities have included indigency waiver provisions in their schemes, and have adopted various approaches for determining eligibility. In Pittsburgh, for example, a sponsor of a parade or other expressive event protected by the First Amendment will not be charged the application fee or any other costs—including for traffic control—upon a showing of indigency. To establish

indigency, the event sponsor must submit a notarized affidavit certifying that:

> (1) The costs to be imposed exceed the available resources of the sponsor/organization and the sponsor/organization does not reasonably foresee such funds becoming available within a reasonable period after the Event; and (2) The sponsor is not charging participation fees or other admittance fees to the general public for the Special Event and has no other sponsor that is underwriting costs.

Pittsburgh, Pa., Code of Ordinances § 470.06(d)(1), (2).[24] The Minneapolis ordinance sets a $25 parade permit fee and also requires applicants—without expense to the city—to

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[24] Pittsburgh's application fee for "First Amendment Activity" is set at an amount that "reflects the cost of evaluation and scheduling the event." § 470.04. The city also requires payment of "cost recovery fees" for the cost of providing public safety and public works services. § 470.06. The total for the application and cost recovery fees for parades may not exceed specified amounts that vary depending on the parade's timing and duration. For example, the maximum charge for a weekday parade lasting no more than two hours is $500 while the maximum is $3,000 for a parade on a weekend or city holiday that lasts more than two hours. § 470.04. However, the city assumes the first $750 of "all costs associated with First Amendment Activity, Parades, community events and block parties." § 470.06(d). Costs for city services that exceed $750 are split equally between the City and the Special Event sponsor, with parades being subject to the maximum fees stated in § 470.04. *Id.*

> (1) . . . provide either authorized civilian or police personnel at all intersections requiring traffic-control personnel.
>
> (2) . . . provide volunteers to monitor the barricades at all intersections not requiring traffic-control personnel, as determined by the department of public works and the police department.
>
> (3) . . . provide, install and remove the barricades, signs and delineation equipment as directed by either the director of public works or the chief of police or their designees.
>
> (4) . . . defend and hold the city harmless from all claims, demands, actions or causes of action, of whatsoever nature or character, arising out of or by reason of the conduct of the activity authorized by such permit, including attorney fees and expenses.

Minneapolis, Minn., Code of Ordinances § 447.120. However, the city provides an indigency exception "[f]or individuals and organizations with limited financial means" if "such burdens substantially threaten the ability of such individuals and organizations to obtain a parade permit." § 447.150. The director of public works may waive the parade requirements under the following circumstances:

> (1) *All parade applications.* The parade applicant and each person responsible for organizing the parade must certify that each: (1) receives public assistance, or (2)

> receives average family income which is less than one hundred twenty-five (125) percent of the federal poverty line, or (3) cannot support his or her family and his or herself and also satisfy the requirements of section 447.120 without substantial hardship. . . .
>
> (2) *Parade applicants for organizations.* In addition, if the proposed parade is to be conducted for, on behalf of, or by an organization, the applicant shall disclose assets held in the name of such organization. The parade applicant must certify to the best of his or her knowledge that the mission, operation, or existence of the organization will be substantially threatened if the requirements of section 447.120 must be satisfied by the organization.

Id.

There are undoubtedly threshold difficulties in these systems of deciding who, in fact, qualifies for the fee exemptions. A determination that fees "exceed the available resources of the sponsor/organization," or that the "existence of the organization will be substantially threatened" if it is required to pay a parade fee involves subjective judgments about allocation of limited resources. Does a nonprofit need to forego mailing this month's newsletter so the cost of postage can be reallocated to parade expenses? Does it need to reassign parade participants who otherwise would be carrying placards to traffic control duties? *See* Goldberger, 62 Tex. L. Rev. at 410-11

(noting that "*Cox* provides no standards for determining what constitutes an oppressive charge" and that the Court did "not indicate whether a charge that might deplete ten percent, twenty-five percent, or fifty percent of a speaker's treasury is excessive or whether such a charge is tolerable"); *see* Bandy Declaration at 7, App. at 115 ("[T]here have been cases where fees imposed on movements for poor people and the homeless in order to hold public demonstrations had the effect of substantially straining the resources of those organizations because they rely heavily upon volunteer organizers and have no offices or regular sources of income.").

These sorts of questions, however, speak to the problems inherent in charging anyone for the exercise of First Amendment rights in streets and other public ways. Even those for whom a parade fee is affordable may be deterred by the prospect of paying several thousand dollars to finance their message. Indeed, the fees deemed permissible—for traffic control, for example—are for "the same services [ ] routinely provided without charge to nonspeech users of streets, sidewalks, and parks," thereby "devalu[ing] speech activities in comparison to nonspeech activities." *Id.* 411; *see also* Neisser, 74 Geo. L.J. at 332 ("[P]olice service fees inherently discriminate against planned public gatherings for expressive purposes, which the first amendment is designed to protect.").

Hence, there is a plausible policy argument that the responsibility for financing First Amendment activities in public fora should belong to the community at large. At a minimum, a gov-

ernment subsidy is a First Amendment imperative when individuals who lack the means to pay required fees seek access to a uniquely powerful public forum for the purpose of speaking on a matter of public concern.

The costs need not be prohibitive for local governments, nor necessarily borne by a single entity. As the likely target of protestors with statewide concerns, a city that serves as the state capital—like Augusta—reasonably could look to state coffers to help finance street marches drawing residents from throughout the state. *See* Neisser, 74 Geo. L.J. at 340-42. Alternatively, allowing indigent applicants to provide their own traffic monitors—perhaps with prior training provided by the police department—could help reduce the cost of monitoring parades.[25] Other approaches for balancing the government's interest in recouping costs and the speaker's right of access to the streets also seem viable: applicants for permits who lack resources may be able to meet city fee requirements through on-the-scene fund raising if offered the opportunity to pay after their event, or perhaps shorter routes or time periods could be designated for such marches, so long as the speaker's message is not improperly compromised. Creative government officials could devise additional solutions that meet constitutional requirements.

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[25] Professor Neisser reported that such an approach was adopted by the City of Palo Alto, California. *See* Neisser, 74 Geo. L.J. at 339 n.387.

III.

When fundamental interests are at stake, the Supreme Court has held repeatedly that the government may not deny equal access to indigents based solely on their inability to pay required fees. The right to march in the streets to disseminate a message of public concern is at the core of the First Amendment and could not be more fundamental. Thus, a parade ordinance that conditions access to the streets on ability to pay cannot withstand the heightened scrutiny applicable to such limitations because, for the reasons I have explained, the streets are a uniquely powerful forum for reaching a wide audience to express views on public policy. No speaker may be denied access for such expression in that forum based on an inability to pay the associated costs. The district court held correctly that "the Parade Ordinance must afford a fee waiver for those unable to pay." 406 F. Supp. 2d at 126. I respectfully dissent from the majority's contrary conclusion.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CV-04-32-B-W

TIMOTHY SULLIVAN et al.,

Plaintiffs,

—v.—

CITY OF AUGUSTA,

Defendant.

ORDER ON MOTIONS FOR JUDGMENT ON LIABILITY

To march is to speak. A parade, as speech, especially as political speech, invokes the First Amendment and commands this Court's protection. A march can be a powerful and effective community expression of ethos: to celebrate our heroes—as on Veterans' Day; to applaud our commonly-held values—as on July 4th; or, consistent with this Country's longest-held traditions, to protest our policies and attempt to effect change —as in Selma or Washington, D.C. Because the right to march lies at the core of our freedoms, this Court concludes Maine's capital city of Augusta may regulate parades only at the edges.

It strikes down municipal regulations based on content or viewpoint discrimination and leaves standing those that are wholly neutral.

I. FACTUAL BACKGROUND[1]

This case marches on. On March 15, 2004, Timothy Sullivan sought a temporary restraining order against the city of Augusta's parade ordinance, claiming its provisions violated the First Amendment rights of the March for Truth Coalition. The Coalition wished to parade on the streets of Maine's capital city to advocate for a host of causes, both political and economic. This Court granted Mr. Sullivan's motion for temporary restraining order only as to the city's bond requirement, leaving the remainder of the ordinance intact. The Plaintiffs have regrouped and reformed, adding a party, a lawyer, and additional evidence raising new issues. This time they have sustained their burden and this Court grants judgment in their favor.

A. Parade Ordinance Fee

The relevant portions of the Parade Ordinance, § 13-5, provide:

> (a) No less than thirty (30) days prior to an intended parade, march or other use of public ways within the city, a permit must be applied therefor to

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[1] In reciting these facts, this Court has imported portions of its earlier decision on Mr. Sullivan's Motion for Temporary Restraining Order. *See Sullivan v. City of Augusta*, 310 F. Supp. 2d 348 (D. Me. 2004)(*Sullivan I*).

the City Police Chief or his designee. The City Manager may allow a shorter time frame for good cause shown.

. . . .

(c) Within ten (10) days of applying for the permit, as a condition to its issuance, the applicant must meet with the Police Chief to discuss and attempt to agree on the details of the route and other logistics.

(d) The Police Chief may deny the permit or alter the route for traffic or safety reasons and impose reasonable conditions including, but not limited to, time limits, requirement to keep moving and on route, no amplification or sound truck, no explosives, fireworks or other artificial noise.

(e) The cost of the permit shall be one hundred dollars ($100.00), plus the costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Department. The permit fee will not include the cost of police protection for public safety. The one hundred dollar ($100.00) fee is payable at the time the application is submitted and the balance at the time of its issuance. The City Council may modify this fee from time to time by Order.

(Code 1970 § 15-6; Ord. No. 244, 1-6-92; Ord. No. 106, 9-8-03; Ord. No. 54, 4-5-04)(Docket # 50—Ex. 2). If the permit is denied or modified, the applicant may appeal in writing within five days to the City Clerk's office "for determination by the City Council." *Id.* at 3-15(g).

B. Mass Outdoor Gathering Ordinance (MOGO).

Section 3-116 of the MOGO provides:

> (a) It is recognized that a mass outdoor gathering attended by two hundred (200) or more persons may create a hazard to public health and safety. Accordingly, it is deemed to be appropriate and in the interest of the public welfare to regulate the conduct of such gatherings in order to protect the public health and safety.
>
> (b) No person shall sponsor, promote or conduct a mass outdoor gathering with the intent to attract or the understanding that the gathering may attract two hundred (200) or more persons until a permit has been obtained thereof from the Augusta Police Chief or his designee. The application for a permit must be submitted no less than thirty (30) days prior to the mass gathering, unless the City Manager allows a shorter time frame for good cause shown.

(Code 1970, § 3-57; Ord. No. 105, 9-8-03).

Section 3-117 directs that:

> The Police Chief shall grant a permit to sponsor, promote or conduct a mass outdoor gathering to be attended by two hundred (200) or more persons upon written application therefore unless it appears to the Police Chief within a reasonable certainty that such gathering will unreasonably endanger the public health or public safety.

(Code 1970, § 3-58; Ord. No. 105, 9-8-03).

Section 3-118 states:

> Prior to the issuance of a permit under this article, the applicant shall furnish the Police Chief with adequate proof that the following will be available at the gathering:
>
> (1) The furnishing of adequate and satisfactory water supply and sewer facilities;
>
> (2) Adequate refuse storage and disposal facilities, adequate medical facilities;
>
> (3) Adequate fire and police protection; and
>
> (4) Such other matters as may be appropriate for security of health and safety.
>
> The Police Chief may review such plans, specifications and reports as is deemed

necessary for a proper review of the proposed mass gathering.

(Code 1970, § 3-59, Ord. No. 105, 9-8-03).

The permit fee is $100.00, plus the "cost estimated by the City for cleanup and traffic control". Section 3-120. The MOGO provisions do not apply "to athletic events conducted by the Board of Education, Little League or other organizations, provided alcohol is not available." Section 3-122.

C. The Applications

1. Timothy Sullivan's February 9, 2004 Application

On February 9, 2004, on behalf of the March for Truth Coalition, Mr. Sullivan filed an "Application for Parade Permit" with the City Police Department, proposing three parade routes. The permit stated the parade would be held on Saturday March 20, 2004, between 12:30-2:00 p.m. *Sullivan*, 310 F. Supp. 2d at 351. Of three approved parade routes, Augusta Deputy Police Chief Major Gregoire (Major Gregoire) determined the first would require twelve officers and two police vehicles for traffic control, costing $2,077.44 and the second, ten officers and two police vehicles, costing $1,761.20. In later discussions, Major Gregoire approved a third route, costing $1,543.08. *Id.* To calculate these costs, Major Gregoire considered only the following factors: "the route to be taken, the duration of the route, the estimated number of people who will attend, whether marchers intend to close the

entire road or only one direction of travel, and whether there are any other events or special circumstances within the City which could affect traffic." *Gregoire Supplemental Aff.* ¶6 (Docket # 50). Major Gregoire based his assessment of traffic control needs only on factors "completely unrelated to the message to be communicated by marchers."[2] *Id.* Mr. Sullivan (and the March for Truth Coalition) claimed not to have the resources to pay the permit fee. *Id.; Sullivan Dep.* at 8:6-12:3, 17:7-18:13 (Docket # 56—Attach. 1).[3]

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[2] Major Gregoire also required the Coalition to furnish a bond of surety in the amount of $10,000.00 or evidence of appropriate insurance. Mr. Sullivan estimated event insurance would cost approximately $450.00. *Sullivan I*, 310 F. Supp. 2d at 351. Mr. Sullivan and the March for Truth Coalition claimed not to have the resources to pay the cost of the bond. *Id.; Sullivan Dep.* at 8-12, 17-18 (Docket # 56—Attach. 1). After this Court's decision on March 19, 2004, the City Council amended the Ordinance on April 5, 2004 to delete the bond provision. *Gregoire Supplemental Aff.* at 15-16 (Docket # 50—Ex. 2). Section 3-119, containing a similar bond provision in the MOGO, was deleted at the same time. *Id.*

[3] Defendant does not dispute Mr. Sullivan made this claim, but notes that at his deposition, Mr. Sullivan asserted the Fifth Amendment with respect to the amount of income on his tax returns. The City asks the Court to draw a negative inference from this assertion. *Def.'s Resp. to Pls.' Statement of Fact* at ¶34 (Docket # 49). A negative inference may be drawn against the party asserting a Fifth Amendment privilege in a civil action. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *In re Carp*, 340 F.3d 15, 23 (1st Cir. 2003); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 678 (1st Cir. 1996). When a Fifth Amendment privilege is posited in a civil action, one party's "assertion of his constitutional right

2. Lawrence Dansinger's August 23, 2004 Application

On August 3, 2004, Lawrence Dansinger applied for a parade permit to hold a peace march/rally on October 16, 2004 in conjunction with the Million Worker March to be held in Washington, D.C. the next day. *Pls.' Statement of Mat. Facts* at ¶46 (Docket # 43—Attach. 1) (PSMF). Mr. Dansinger agreed to apply for the permit and assumed Mr. Sullivan and Tony Aman "would be doing other aspects of the orga-

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should not obliterate another party's right to a fair proceeding." *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996); *DirecTV, Inc. v. Lovejoy*, 366 F. Supp. 2d 132, 137 (D. Me. 2005). To balance these concerns, the Court is directed to determine whether there were "alternative means" to obtain substantially the same information. *Serafino*, 82 F.3d at 519. Here, Magistrate Judge Kravchuk concluded that, in its attempts to obtain Mr. Sullivan's tax records, the Defendant did not avail itself of the procedure set forth in the scheduling order and failed to follow the informal conference mechanism under the Local Rule. *Report of Telephone Conference and Order*, 11/15/2004 (Docket # 38). She further determined that the City "does have testimony about plaintiff's income developed during the course of the deposition." *Id.* She denied the City's Motion to Shorten the Deadline for Production of Records or in the alternative Dismiss the Claim for Invoking the Fifth Amendment. *Id.* Consistent with Magistrate Judge Kravchuk's Order, this Court declines to draw a negative inference from Mr. Sullivan's assertion of his Fifth Amendment privilege. The City has failed to demonstrate that there were no alternative means to obtain substantially the same information. *Serafino*, 82 F.3d at 519; *DirecTV, Inc.*, 366 F. Supp. 2d at 138 ("Before drawing a negative inference in a civil matter from a party's assertion of the Fifth Amendment, the court should be convinced it is necessary to do so.").

nizing." *Dansigner Dep.* at 19:10-12 (Docket # 56—Attach. 2). The Augusta Police Department responded to Mr. Dansinger's application by letter dated September 15, 2004, advising him that, in addition to the initial application fee of $100.00, approval of the parade permit was conditioned on payment of $1,979.32. *PSMF* ¶ 53. Mr. Dansinger responded by a letter from his attorney dated September 29, 2004, explaining that the permit fee of almost $2,000.00 created a substantial financial hardship for him and requesting the fee be waived because of his limited financial means. *Id.* ¶ 54. This letter explained that Mr. Dansinger's annual income was $8,400.00, asserted that he could not afford to pay the additional estimated permit fee, and requested that the City establish an inability to pay exception for the traffic control fees charged for free speech activities. *Id.* The City never responded. *Id.* ¶ 55. The Augusta Police Department does not consider financial hardship in acting upon an application for a parade permit. *Id.*

D. *Sullivan I*: This Court's Previous Decision[4]

In *Sullivan I,* this Court addressed only the constitutionality of the Parade Ordinance, not the MOGO. This Court upheld the City's mandatory application fee and imposition of costs associated with police services, stating there "is no evidence . . . the application fee is anything but administrative" and "the police fee is simply a

[4] This opinion was issued before Mr. Dansinger's application.

mathematical computation based on the Police Chief's assessment of the police presence necessitated by the parade route." *Sullivan,* 310 F. Supp. 2d at 354. However, this Court struck down the ordinance's bond requirement, explaining that it "requires to some degree that the police chief assess the content of the proposed event" and "fails to articulate the standards by which such a determination . . .may be made." *Id.* at 355. In response, the City amended the Parade Ordinance and the MOGO to delete the bond provision. *See supra* fn 2.

II. LEGAL STANDARD

The parties have submitted this case on a stipulated record, which "allows the judge to decide any significant issues of material fact that he discovers." *Boston Five Cents Sav. Bank v. Sec'y of Dep't of Housing & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985).

III. DISCUSSION

The Plaintiffs contend that certain of the City's ordinances are unconstitutional both on their face and as applied because they impermissibly discriminate based on content, allow too much discretion in the licensing authority, are not narrowly tailored to serve a significant governmental interest while preserving ample alternatives for communication, and do not provide an exception to the large permit fee for citizens or groups for whom the fee causes a substantial financial hardship.

A. Standing

As a threshold matter, this Court must examine the City's contention that the Plaintiffs do not have standing to raise facial challenges to the constitutionality of the MOGO and the thirty-day advance notice requirement in both ordinances. *Def.'s Resp. to Pls.' Mot. for J. on Liability and Cross-Mot. for J. on Liability and Incorporated Mem. of Law* at 15, 33 (Docket # 48)(*Def.'s Resp.*). Article III standing contains three elements: (1) "an injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; and, (3) likelihood that the injury will be " 'redressed by a favorable decision.' " *Lujan v. Defender of Wildlife,* 504 U.S. 555, 560-61 (1992). The first element of the standing inquiry—the injury in fact—is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.' " *Id.* at 560 (citations omitted). A plaintiff must show that " 'he has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983)(citations omitted). Interwoven with these Article III elements are prudential considerations that limit which cases a court may hear, including the requirement that: "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Sec'y of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984)(citations omitted).

When a challenge asserts that a statute or ordinance is, on its face, unconstitutional, particularly in the First Amendment context, the type of facial challenge affects the standing analysis. A statute may be facially unconstitutional if (1) "it is unconstitutional in every conceivable application"; or, (2) "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 796 (1984).[5] Concerning the first type of challenge, courts have not created "any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court". *Id.* at 798.

However, when "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression", courts have applied a more relaxed standard. *Munson,* 467 U.S. at 956-57; *Taxpayers for Vincent,* 466 U.S. at 799; *Forsyth County v. The Nationalist Movement,* 505 U.S. 123, 129 (1992)("it is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable . . . this exception from general standing rules is based on an appreciation that the

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[5] A successful challenge to the facial constitutionality of a law invalidates the law itself. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982)("A 'facial' challenge . . . means a claim that the law is invalid *in toto*").

very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court")(citations omitted); *Freedman v. Maryland,* 380 U.S. 51, 56 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license."). The rationale for this relaxation is that when a statute is unduly overbroad, there exists "a danger of chilling free speech" in society as a whole. *Munson,* 467 U.S. at 956-57; *Broadrick v. Oklahoma,* 413 U.S. 601, 612-13 (1973)(discussing cases where a plaintiff has standing to bring facial overbreadth challenges, including prior restraint and unreasonable time, place and manner claims, "not because his own rights have been violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

Plaintiffs argue they are mounting such a facial challenge. *Pls.' Reply Mem. in Support of Mot. for J. on Liability Issues and Obj. to Def.'s Cross Motion for J. on Liability Reply* at 3 (Docket # 55)(*Pls.'s Reply*)("Because the potential application of the City's MGO and the 30- day advance notice requirements in both its Parade Ordinance and its MGO may chill the speech of the Plaintiffs *or others* . . . Plaintiffs have standing")(emphasis supplied). As noted by the Supreme Court in *Forsyth,* a classic example of

overbreadth is an ordinance that "delegates overly broad discretion to the decisionmaker." 505 U.S. at 129. Among the attacks Plaintiffs launch are challenges to the discretion allowed the decisionmaker in both ordinances regarding the computation of the traffic control fee and the waiver of the 30-day notice fee. *Pls.' Mot. for J. on Liability Issues Based on a Stipulated Record* at 3-4, 25-29 (Docket # 43)(*Pls.' Mot.*).[6] This Court agrees the Plaintiffs have raised a challenge to the statute's reach sufficient to relax the prudential limitations on standing.

This does not end the standing inquiry. The First Circuit recently noted in *Osediacz v. City of Cranston,* 414 F.3d 136 (1st Cir. 2005): "When certain types of facial challenges to statutes, ordinances, regulations, or governmental policies are premised on First Amendment grounds, they invite a lowering of conventional standing barriers because the traditional jus tertii ban on litigating the rights of third parties is arguably inapplicable . . . [citing *Forsyth County*] . . . thus, the lowering of the bar intersects with standing doctrine *only on the issue of third-party standing*". *Id.* at 140 (emphasis supplied). The Court went on to state; however, that "the Court did not, however, carve out any exception to the core requirements of constitutional standing. These requirements, including the bedrock

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[6] Plaintiffs mount a third challenge to the discretion allowed the decisionmaker, regarding the provision in the Parade Ordinance requiring that an applicant meet with the Police Chief and attempt to agree on logistics. *Pls.' Mot.* at 30. This challenge, while it will be discussed later, is not relevant for purposes of determining justiciability.

requirement that the plaintiff . . . have suffered an injury in fact, were left intact." *Id.* at 141. *See also Munson,* 467 U.S. at 958 ("The crucial issues are *whether Munson satisfies the requirement of 'injury-in-fact,'* and whether it can be expected satisfactorily to frame the issues in the case. If so, there is no reason that Munson need also be a charity. If not, Munson could not bring this challenge even if it were a charity")(emphasis supplied); *Schaumburg v. Citizens for Better Env't.,* 444 U.S. 620, 634 (1980)(*"given a case or controversy,* a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court")(emphasis supplied); *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)(noting, in a First Amendment case, that the federal courts "do not render advisory opinions").

To challenge the MOGO, Plaintiffs must show that they meet the requirements of constitutional standing. While they bear the burden of proof on this issue, *Lujan,* 504 U. S. at 561, the inquiry has been described as "not very demanding". *Osediacz,* 414 F.3d at 143. In *Osediacz,* at issue was a Cranston, Rhode Island policy that allowed private parties to erect holiday displays on the south lawn of City Hall, subject to certain administrative requirements and mayoral approval. 414 F.3d at 137-38. Plaintiff claimed the policy violated the First and Fourteenth Amendments, but the First Circuit, speaking through Judge Selya, concluded she had not shown "some reasonable possibility that she would be subject to the constitutionally defective action". *Id.* at 143.

Osediacz explained the record must contain "evidence sufficient to indicate an objectively reasonable possibility that she would be subject to the allegedly unconstitutional mayoral approval requirement". *Id.* at 143.

Here, Plaintiffs' reply motion gives the Court scant reason to conclude that the constitutional as opposed to the prudential requirements of standing, have been met. *See Pls.' Reply* at 3. In their motion, however, Plaintiffs state that "the plain language of the Ordinance unequivocally applies to a march held on a public street in Augusta 'with the intent to attract or with the understanding that the gathering may attract two hundred (200) or more persons' " . . . the unexplained exercise of discretion by the Augusta Police Department not to apply the City's Mass Outdoor Gatherings Ordinance does not cure the unconstitutional content discrimination set forth in the plain language of the Ordinance itself." *Pls.' Mot.* at 24. If Plaintiffs are correct that the MOGO applies to marches such as the ones that they wished to hold, this could satisfy the "reasonable possibility" that they would be subject to the constitutionally defective action. The City argues the MOGO does not apply to parades. *Def.'s Resp.* at 33-34. In support, Defendant makes two points: (1) the MOGO on its face does not apply to parades; and, (2) even if a "strained reading" could lead to the conclusion that it applied, the City has made it clear it does not. *Id.* Simply put, the City contends a mass gathering is not a parade.

However, the ordinance nowhere defines "mass gathering" and a parade could well meet common

definitions of the phrase.[7] More specifically, the City points to the following language in the MOGO:

> "Prior to the issuance of a permit under this article, the applicant shall furnish the Police Chief with adequate proof that the following will be available at the gathering:
>
> (1) The furnishing of adequate and satisfactory water supply and sewer facilities;
>
> (2) Adequate refuse storage and disposal facilities, adequate medical facilities; . . . ."

Sec. 3-118. The City contends that "[t]he language of the ordinance, by requiring the applicant to provide the police chief with proof that water and sewer facilities, refuse storage and disposal facilities, and medical facilities were available, demonstrate that the permit require-

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[7] Webster's Third International Dictionary defines "mass" as "participated in, attended by, or affecting a large number of individuals". WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1388 (3d ed. 2002). It defines "gathering" as "a coming together of people in a group (as for social, religious, or political purposes)." *Id.* at 940. There is nothing inherent in the definition of mass gathering that requires it to be stationary; thus, a parade, depending on its size, could be a mass gathering. Presumably, as the City would have it, the difference between a large parade and a mass gathering must be that a parade is moving. The point at which a group of paraders walks slowly enough to become mass gatherers (or vice versa) is something the ordinance does not attempt to define nor is this Court willing to try.

ments do not pertain to people simply walking on the sidewalk, even if more than 200 people are involved." *Def.'s Resp.* at 33. This Court, however, does not agree this language is so clear to conclude that there is no "reasonable possibility" this ordinance could not cover parades. Under this language, the City could well require the sponsor of a large parade to provide medical treatment and water for its marchers as well as trash receptacles. The requirement of sewer facilities (presumably portable toilets) would be less likely, but not out of the question.

The ambiguity of this language is reflected in Major Gregoire's testimony on October 6, 2004. Responding to whether a large parade was a mass gathering, he stated: "That's—I mean, that's an interpretation. I don't know. I would have to review what the ordinance said. They are moving and that type of thing. They could be considered a parade. It's a matter of interpretation". *Gregoire Dep.* at 5:13-17 (Docket # 56—Attach. 6). It is true that Major Gregoire later read the MOGO language unambiguously. On March 15, 2005 in his supplemental affidavit, he stated: "the City interprets the Mass Outdoor Gathering permit to only apply to a gathering which occurs at a fixed location". *Gregoire Supplemental Aff.* ¶13; *Resp. to Pls.' Statement of Facts* at ¶65 (Docket # 49)(RPSF).

Authoritative limiting constructions by the City are certainly relevant in evaluating the ordinance, *see Ward v. Rock against Racism*, 491 U.S. 781, 795-96 (1989), but this Court finds significant that the City first offered its limiting construction well into this lawsuit—over a year after

Mr. Sullivan's parade application. As such, this Court cannot consider the City's interpretation to be the kind of "long standing practice" which should guide the interpretation of the ordinance. *Paulsen v. Gotbaum,* No. 90-Civ.-6152, 1992 U.S. Dist. LEXIS 396, *1 n.1 (S.D.N.Y. Jan. 14, 1992). Rather, it is an apparently non-binding, non-authoritative statement by the Deputy Chief of Police.[8] If Major Gregoire changed his mind once, he could do so again. Indeed, the record reflects that from the time the Plaintiffs applied for their permits, there was a reasonable possibility that the City might interpret the MOGO to apply to their conduct. *See Becker v. FEC.,* 230 F.3d 381, 386 n.3 (1st Cir. 2000)(citing *Lujan* and other case law for the proposition that standing is to be assessed under the facts existing when the complaint is filed). Consequently, in light of Major Gregoire's changing testimony and in the absence of any evidence of a standard long-standing municipal practice, this Court finds the city of Augusta has not adopted an authoritative interpretation of the MOGO so as to eliminate its application to marches or parades.

The Plaintiffs having satisfied the first element of the standing inquiry, i.e. that they were in the

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[8] In *Ward,* the City had to some extent tied its hands by adopting and formally promulgating a "Use Guideline" as a narrowing construction. *Id.* at 787. The Supreme Court found this sufficient, and also cited with approval limiting interpretations offered by "a state court or enforcement agency". *Id.* at 796 (emphasis supplied). In contrast, in this case, no external body has offered a narrowing interpretation and the City has not made any attempt to make its own interpretation binding.

class of people potentially chilled by the language of the ordinance and thus suffered an injury in fact, must still show a causal connection between the injury and the conduct complained of, and a likelihood the injury will be redressed by a favorable decision. The second element requires a "fairly traceable" connection. *Vt. Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 771 (2000)(citations omitted). The City argues there is no evidence the Plaintiffs altered their conduct in any way based on the language of the ordinance. *Def.'s Resp.* at 35. Nevertheless, one of Plaintiffs' primary complaints involves the lack of a financial hardship exception, as even Defendant admits: "Sullivan's only claim of injury is a claim that he paid too much for the parade permit fee . . . Dansinger's claimed injury is that . . . he could not afford the permit fee". *Id.* Both the Parade Ordinance and the MOGO have nearly identical provisions requiring fees for application, traffic control, and clean up costs. Sec 13.5(e); 3-120.[9]

If Plaintiffs had to show that they in fact applied for a MOGO permit to obtain standing to challenge the ordinance, it would not be enough simply to show that they were in the potential class chilled by the MOGO and that the fee provision was an obstacle to speech. Instead, they

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[9] Compare: "the cost of the permit shall be one hundred dollars ($100.00), plus the costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Department" (Parade Ordinance) with "the fee for a permit under this article shall be one hundred dollars ($100.00), plus the cost estimated by the city for cleanup and traffic control" (MOGO).

would be limited to challenging the provisions of the Parade Ordinance—under which they actually applied for a permit and concerning which particular fee requirement they found onerous. However, given that Plaintiffs do not have to show that they in fact applied for a permit, *see Freedman*, 380 U.S. at 56; *Osediacz*, 414 F.3d at 143, their complaint regarding the deterrent effect of a financial hardship exception is fairly traceable not only to the fee provisions of the Parade Ordinance, but to the identical ones of the MOGO.[10] Likewise, striking down the fee provisions of the MOGO would provide some redress to the Plaintiffs' complaint of foreclosed avenues of adequate expression based on financial hardship. *See Pls.' Mot.* at 37 ("The lack of an exemption in both of the City's Ordinances for citizens or groups who would suffer a substantial financial hardship from the permit fees also leaves the plaintiffs and many other Maine citizens and groups without 'open, ample alternatives for communication' "). While the issue is a close one, Plaintiffs have standing to challenge the MOGO.

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[10] For a similar reason, Defendant's argument that because there is no evidence that any one, including the Plaintiffs, has ever applied for a good cause waiver of the thirty-day notice requirement, the provision consequently cannot be justiciable, must fail. *Def.'s Resp.* at 15. In the context of a First Amendment facial challenge, it is not necessary to show the parties actually applied for a permit in order to bring a challenge. *Freedman*, 380 U.S. at 56; *Osediacz*, 414 F.3d at 143.

B. Ripeness

The City asserts an additional preliminary matter; namely, that the claims against the MOGO are not ripe because there is no current justiciable controversy. *Def.'s Resp.* at 35. Ripeness generally involves an evaluation of the fitness of the issue and the hardship of withholding immediate judicial consideration. *Rhode Island Ass'n of Realtors v. Whitehouse,* 199 F.3d 26, 33 (1st Cir. 1999). However, when free speech is at issue, the same chilling effect concerns call for a relaxation of ripeness requirements. *El Dia, Inc., v. Hernandez Colon,* 963 F.2d 488, 496 (1st Cir. 1992)(holding that "a facial challenge of this sort, implicating First Amendment values, customarily works a relaxation of the ripeness criteria"); *Currence v. City of Cincinnati,* No. 00-3985, 2002 U.S. App. LEXIS 1258, *7-*8 (6th Cir. Jan. 24, 2002); *New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1499 (10th Cir. 1995). The First Circuit has explained that the rationale behind this relaxation stems from fear of irretrievable loss. *El Dia,* 963 F.2d at 496. *See also Gonzales,* 64 F.3d at 1500 ("First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill").

Consequently, when First Amendment claims are presented, "reasonable predictability of enforcement or threats of enforcement, without

more, have sometimes been enough to ripen a claim". *Id.* at 1499 (citing *Martin Tractor Co. v. Fed. Elec. Comm.*, 627 F.2d 375, 380 (D.C. Cir. 1980). The standing and ripeness concerns are intertwined, the core being the reasonable fear of enforcement. *Rhode Island,* 199 F.3d at 29 (citing *Adult Video Ass'n v. Barr,* 960 F.2d 781, 786 (9th Cir. 1992)("Our conclusion that a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problem"), *vacated,* 509 U.S. 917 (1993), *reinstated in relevant part,* 41 F.3d 503 (9th Cir. 1994)). Here, Plaintiffs had a reasonable fear the ordinance would apply to their application. Therefore, their claims would have been ripe as of that date. The question is whether the subsequent affidavit by Major Gregoire, stating that the City does not interpret the MOGO to apply to parades, alters this conclusion.

The answer depends on when the ripeness inquiry should be made—at the time of complaint or at the time of decision. If the latter, Plaintiff's claim may not be ripe; if the former, it is. Somewhat surprisingly, however, this is hardly a straightforward issue. *See Rhode Island,* 199 F.3d at 33 (claims "ripe when filed"); *Cmty. Hous. of Me. v. Martinez,* 146 F. Supp. 2d 36, 44 (D. Me. 2001)("the real ripeness issue . . . is whether rights or obligations had been determined or legal consequences had flowed at the time the amended complaint was filed, when the policy was in force"); *Ctr. for Science in the Public Interest et al. v. FDA,* No. 03-1962, 2004 U.S. Dist LEXIS 20781, at *8 (D.D.C. Sept. 17, 2004) (review conducted on facts existing at the time of

the filing of the complaint); *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1062 (D. Ariz. 2001)(same); *Democratic Nat'. Comm. v. Watada*, 198 F. Supp. 2d 1193, 1197 (D. Haw. 2001); *Bradley v. Work*, 916 F. Supp. 1446, 1464 (S.D. Ind. 1996)(same). *But see Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)("since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern"); *Buckley v. Valeo*, 424 U.S. 1, 113-14 (1976)('ripeness is peculiarly a question of timing', and therefore the passage of months between the time of the decision of the Court of Appeals and our present ruling is of itself significant")(citation omitted); *Am. Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293, 302 n.4 (2d Cir. 1989)("We note that it is irrelevant whether the case was ripe for review when the complaint was filed"); *Manley v. Texas*, No. 6-01CV231, 2001 U.S. Dist. LEXIS 25427, at *5-*6 (E.D. Tex. 2001)("whether a case is ripe depends on the state of affairs at the time the court is called upon to render a decision").

This Court concludes that the *Regional Rail* line of authority is distinguishable from this case. In the *Regional Rail* cases, the issue was whether intervening events could make ripe a previously unripe challenge. In contrast, the current concern is whether intervening events can render unripe a previously ripe challenge. Upon analysis, this issue is one of mootness, rather than ripeness. *See Martinez*, 146 F. Supp. 2d at 44 ("HUD also argues that because the policy has been retracted it is not an action by which rights

or obligations have been determined, or from which legal consequences will flow. That argument conflates ripeness and mootness"); *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)(defining the ripeness inquiry as turning on "whether the harm asserted has matured sufficiently to warrant judicial intervention" and the mootness inquiry as turning on "whether the occasion for judicial intervention persists").[11] This Court con-

[11] The City has not argued that Plaintiff's MOGO claim is moot. Nevertheless, this remains an appropriate question. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)("Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority")(*accord Allende v. Shultz*, 845 F.2d 1111, 1115 n.7 (1st Cir. 1988)("Mootness . . . is a threshold jurisdictional issue which this court may raise *sua sponte*")). This Court cannot conclude solely on Major Gregoire's affidavit that the City is henceforth barred from applying the MOGO to parades. In *Martinez*, Judge Hornby noted:

> The Supreme Court recently reaffirmed the general rule that voluntarily ending a challenged practice after a case is filed does not make the case moot. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). The rule prevents a defendant from evading judgment on the merits of a case by temporarily stopping the challenged practice, only to be "free to return to his old ways" after dismissal. *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)). A defendant can moot a case through voluntary change only if it carries the "heavy burden" of persuading the court that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*,

cludes that the proper moment to determine the ripeness of Plaintiffs' cause of action is not now, but the time of the complaint. Thus, the Plaintiffs' facial challenge to the MOGO is ripe for judicial consideration.[12]

C. The Ordinances

Turning at last to the parties' substantive arguments, the first step is to determine what

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> 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968)) . . . In this case, HUD has offered no assurance that it would not reinstate the challenged policy if I were to dismiss the case as moot. Nor am I aware of any legal or practical constraints that would stop HUD from returning to its old ways. To the contrary, HUD abandoned the challenged policy through a swift, informal, and opaque process, and I have no reason to believe that it could not easily reinstate the policy in the same way. If it were to do so, Community Housing would again face the injuries discussed above. Thus, HUD has not satisfied its heavy burden, and Community Housing's claims are not moot.

146 F. Supp. 2d.at 42-43. *See also Allende*, 845 F.2d at 1115 n.7 ("Although the specific application of that policy against Allende in March 1983 is moot, the validity of that policy in general remains a live controversy"). Major Gregoire once testified that whether the MOGO applied to parades was a "matter of interpretation." *Gregoire Dep.* at 5 (Docket # 56—Attach. 6). He now says the City does not interpret the MOGO to apply to such events. Major Gregoire's change of heart hardly inspires confidence that the MOGO could not be interpreted to apply to parades, or that anything prevents the City from doing so in the future.

[12] Even were Major Gregoire's supplemental affidavit considered in this context, given this Court's previous conclusion that it is not an authoritative interpretation, the outcome would be the same.

level of scrutiny to apply. In the world of First Amendment law, the standard of scrutiny depends on content neutrality. Regulations of speech not regarded as content neutral will be sustained only if they are shown to be narrowly tailored to promote a compelling government interest. *United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803, 813 (2000). Reasonable restrictions on the time, place, or manner of protected speech regarded as content neutral, however, receive "intermediate" rather than "strict" scrutiny. *Casey v. City of Newport*, 308 F.3d 106, 110-11 (1st Cir. 2002). *See also Ward*, 491 U.S. at 791; *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995)).

1. Content

In *Ward*, the Supreme Court explained that "the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. "Thus, a law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched." *McGuire v. Reilly*, 260 F.3d 36, 43 (1st Cir. 2001)(citing *Hill v. Colo.*, 530 U.S. 703, 736 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)). The critical inquiry in determining content neutrality is not whether certain speakers are disproportionately burdened, but rather, whether the reason for the

differential treatment is, or is not, content-based. *See Hill*, 530 U.S. at 719-20 (positing that a statute is content-neutral when it does not directly regulate speech, or bears a legislative history evidencing its neutrality and is content-neutral on its face, or advances interests unconnected to expressive content). So long as a legitimate purpose unrelated to expressive content can be shown, "all that remains is for the government to show that accomplishment of the legitimate purpose that prompted the law also rationally explains its differential impact." *McGuire*, 260 F.3d at 44 (citing *City of Renton*, 475 U.S. at 47-48; *Nat'l Amusements*, 43 F.3d at 738). *See also McGuire v. Reilly*, 386 F.3d 45, 63 (1st Cir. 2004)(indicating that some showing of discriminatory intent is necessary to make out an as-applied First Amendment viewpoint discrimination claim when legislative motivations were content neutral).

a. MOGO

The Plaintiffs argue that, on its face, the MOGO impermissibly discriminates in favor of athletic events, because the ordinance exempts all "athletic events conducted by the Board of Education, Little League or other organizations, provided that alcohol is not available." *Pls.' Mot.* at 23 (quoting § 3-122).[13] This Court agrees that

[13] In its *Supplemental Mem. of Auth. in Support of Mot. for J. on Stipulated Record* at 5-7 (Docket # 64) (*Def.'s Suppl. Mem.*), Defendant argues that "athletic events" are not protected speech under the First Amendment. Plaintiffs respond that the Defendant has waived this issue, since it was not presented in its earlier responsive brief. *Pls.' Reply*

the MOGO purposefully provides for content-based differential treatment and is subject to strict scrutiny.

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to Def.'s Supplemental Mem. of Auth. at 1 (Docket # 68)(*Reply to Suppl. Mem.*). Plaintiffs are incorrect. At oral argument the parties asked for and this Court allowed supplemental memoranda. The City filed a consented-to motion that allowed the parties to submit supplemental authority "in response to issues raised during argument". *Consent Mot. for Leave to File Mem. of Supplemental Auth. By June 10, 2005* (Docket # 61)(emphasis supplied). Whether athletic events are protected speech was raised during oral argument. Regardless, the issue must fail.

"Athletic events" is a broad label and encompasses a wide range of activity. Concededly, conduct, even expressive conduct, cannot always be dubbed protected speech. *See Spence v. Washington*, 418 U.S. 405, 409-10 (1974). Relevant to this determination is the factual context and nature of the activity (i.e. whether it has "communicative connotations"). Some courts have concluded that athletic activity may be protected speech. *See Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 86 (D. Conn. 1981)(finding that the exposition of an athletic exercise and the entertainment derived therefrom were "on the periphery of protected speech"). But many others have hesitated to declare that restraints on athletic activity violate the First Amendment. *See Gun Owner's Action League v. Swift*, 284 F.3d 198, 211 (1st Cir. 2002)(concerning an Act prohibiting licensed gun clubs from allowing the shooting at targets with human images on it, finding that "no court has recognized target shooting as a constitutionally protected form of expression", but assuming for the purpose of the content-neutral/content-based analysis that it was expressive content); *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y.1995), *aff'd* 95 F.3d 224 (2d Cir. 1996)(an amateur boxing team composed of police officers failed to present a First Amendment claim when NYPD refused to officially recognize the team); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1366 n.4 (11th Cir. 1987)(refusing to find protection

The Supreme Court has held that a restriction on speech is content-based when, like here, the message determines whether the speech is sub-

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for shirtless jogging); *Allendale Leasing, Inc. v. Stone,* 614 F. Supp. 1440, 1454 (D.R.I. 1985)(state government may ban gambling without impairing First Amendment rights); *Justice v. Nat'l. Collegiate Athletic Assoc.,* 577 F. Supp. 356, 374 (D. Ariz. 1983)(sanctions on a football team not a prior restraint on speech).

The Achilles' heel of the City's ordinance is the breadth of the phrase "athletic events" and its exception for two named and "other organizations". The courts that have concluded the First Amendment does not apply to athletic events have addressed one specific form of athletic activity regardless of the number of spectators. By contrast, the MOGO exempts from a permit requirement any large-scale "athletic event". Plaintiff contends that while "pure athletic activities and games may not be protected by the First Amendment, free speech activities are quite foreseeable at the broader category of an 'athletic event' ". *Reply to Suppl. Mem.* at 1-2. *See, e.g., Aubrey v. City of Cincinnati,* 815 F. Supp. 1100, 1102 n.2 (S.D. Ohio. 1993)("we note that many forms of expression are present at various Reds' games"). By exempting "athletic events" from permitting requirements, the City exempts any expression associated with the athletic competition itself. But, the focus of the ordinance is not the athletes, who by themselves will rarely collectively meet the 200 person trigger for the MOGO's application. It must be the spectators who attend the event. What then makes a gathering of 200 plus athletic fans different than other mass gatherings to warrant a municipal exemption? Is it the safety concern? Are athletic fans less rowdy or vociferous, less prone to need medical care, water and sewer facilities, or generally neater than, say, the people in the March for Truth Coalition? If so, the City has produced no such evidence. Instead, the conclusion is inescapable that the City has made this exception based on content. It may be understandable that the City would wish to foster the promotion of athleticism, particularly the support of local athletes. But,

ject to the restriction. *See Arkansas Writers' Project, Inc., v. Ragland,* 481 U.S. 221, 230 (1987). Accordingly, courts have found ordinances pro-

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this is a choice based on assumptions about the value of athletic events and corresponding assumptions about the value (or lack thereof) of political events. *See R.A.V. v. St. Paul,* 505 U.S. 377, 386 (1992)("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed").

In addition, there is inherent ambiguity in the phrase "other organizations". Defendant relies on the principle of *ejusdem generis* under which general words following the enumeration of particular classes of things will be construed as applying only to things of the same general class as those expressly listed. *See United States v. McKelvey,* 203 F.3d 66, 71 (1st Cir. 2000); BLACK'S LAW DICTIONARY 535 (7th ed. 1999). It contends the term "other" organization in the athletic event exemption to the MOGO, must be interpreted to refer to other organizations similar to the Board of Education or the Little League; organizations that regularly sponsor youth athletic events. *Def.'s Suppl. Mem.* at 6-7. But, the Little League, despite its iconic status in American culture, is a more complex examplar than meets the eye. First, the Little League has a long tradition of corporate sponsorship and when youngsters emblazoned with the name of a local business take the field, the business has sent a message to the players as well as the parents, grandparents and fans in the stands. Moreover, the advent of national television coverage for the Little League play-offs complete with television ads and play by play announcers has blurred distinctions between the Little League and what could be considered similar organizations. By singling out the Little League, the ordinance opens itself up to a broader range of organizations, which use corporate sponsorship to promote athletic events.

Even applying *ejusdem generis,* there remains an ambiguity as to what organizations would be deemed similar to the Board of Education or Little League. Do the examples of the Board of Education and Little League imply that only athletic events involving minors would qualify? Would an

viding similar exemptions to be content-based regulations. *See, e.g, Hotel Employees & Res. Employees Union, Local 2850 v. City of Lafayette,*

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athletic league sponsored the city adult education program qualify? A Police Athletic League (PAL)? A Catholic Youth Organization (CYO)? A Republican or Democratic Party league? To make the decision as to which does and does not qualify, someone in city government must make a judgment about the nature of the organization and the content of its message. Is it an organization upon which the ordinance (and the City) has placed its imprimatur or an organization it has not and how is that decision to be made without reference to the organization's purpose and message?

This argument addresses only the ambiguity in the phrase "other organization", as applied to the section addressing who conducts the event. It does not address ambiguity in what an "athletic event" itself could encompass. A baseball or football game falls within the scope, but events that mix political and athletic activity, so long as they could find a suitable sponsor, could also fall within the ordinance's purview. What if an elected representative, such as the Governor, threw out the traditional first pitch of a Little League baseball game? A local church sponsored a field day with the proceeds to support a variety of humanitarian causes? Legislative staffers put on a tag football game, Rs v. Ds, and charged admission, the proceeds to fund construction of a new Little League field? The inescapable conclusion is that this ordinance favors organizations and activities the City encourages and there is no way to enforce it without making content-based judgments. *See Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230 (1987)("If articles in the Arkansas Times were uniformly devoted to religion or sports, the magazine would be exempt from sales tax. . . . However, because the articles deal with a variety of subjects (sometimes including religion and sports), the Commissioner has determined the magazine's sales may be taxed. . . . Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.").

No. C-95-3519 SAW, 1995 WL 870959, at *2 (N.D. Cal. Nov. 2, 1995)(exemption for "vehicular wedding or funeral procession" is content-based); *Trewhella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1068-69 (E.D. Wis. 2003)(exemption for labor union picketers, school groups, veterans' organizations and governmental agencies is content-based); *Ohio Citizen Action v. City of Avon Lake*, 986 F. Supp. 454, 458-60 (N.D. Ohio 1997)(exemption for individuals "seventeen years of age or younger . . . soliciting contributions or offering for sale any goods for any religious, charitable, civic, educational or political organization, or . . . soliciting for a newspaper or something personally manufactured, raised or produced, or . . . rendering personal services" is content-based).[14] In contrast, the Supreme Court deter-

[14] Some plaintiffs have argued that municipal parade ordinances requiring parade permits, but granting certain exemptions to particular groups, should be held invalid under the Equal Protection Clause. For example, in *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. 1981), the Fifth Circuit held that municipal parade ordinances granting licensing and regulatory exemptions to students participating in educational activities and to governmental agencies violated the Equal Protection Clause, as there was no legitimate and important governmental interest furthered by the differential treatment. The City argued those excepted groups posed less of a security threat than others. However, the Court pointed out the City had acknowledged the exempted groups disrupted the flow of traffic and emergency vehicles to the same extent as any other group parading through the streets, and posited that the asserted difference had to have been the content of the speech of groups involved in protests, demonstrations, or advocacy posed a greater security risk than traditional groups whose parades tended to be merely festive. The Court noted that

mined that a permit ordinance covering all types of large-scale events—including political and athletic events—at a public park did not discriminate on the basis of content because "none of the grounds for denying a permit has anything to do with what a speaker might say": the "picnicker and soccer-player, no less than the political activist or parade marshal, must apply for a permit of the 50-person limit is to be exceeded." *Thomas v. Chicago Park District,* 534 U.S. 316, 322 (2002).

The MOGO, on its face, discriminates based on the subject matter of the speech by exempting certain categories of gatherings from the permit requirement. The MOGO's exceptions regulate on the basis of the subject-matter of the gathering. The same size event, in the same place, with the same impact—indeed the same people present—so long as the event concerns athletics—is excused from obtaining a permit. For this reason, the MOGO cannot be considered content-neutral. *See Dowling v. Township of Woodbridge,* No. Civ.05-313(WGB), 2005 WL 419734, at *5 (D.N.J. Feb. 22, 2005)(exempting certain categories of

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differential treatment of groups based on the content of their speech is unconstitutional. *Id.* at 514. While the City argued the purpose of this differentiation was to prevent the security risks posed by groups other than those excepted, the Court responded that to uphold this disparate treatment the Court would have to find those parades subject to the ordinance would surely result in direct, immediate, and irreparable damage. Finding the record entirely devoid of such evidence, the Court concluded the City had classified groups based on the content of their speech without showing any legitimate and compelling interest to justify the differential treatment. *Id.*

demonstrations from the pre-registration requirement is a content-based regulation); *N.J. Freedom Org. v. City of N.B.*, 7 F. Supp. 2d 499, 509 (D.N.J. 1997).

Once an ordinance is found not to be content-neutral, it can be upheld only if it is found necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Playboy*, 529 U.S. at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"). Such content-based restrictions are "presumptively invalid". *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)(citations omitted). The justification for the MOGO is as follows: "It is recognized that a mass outdoor gathering attended by two hundred (200) or more persons may create a hazard to public health and safety. Accordingly, it is deemed to be appropriate and in the interest of the public welfare to regulate the conduct of such gatherings in order to protect the public health and safety." Sec. 3-116.[15] Even if it

[15] In its supplemental memorandum, the City provides an additional content-neutral justification for the exemption, namely that it "advance[s] substantial government interests unrelated to speech (e.g. organized athletics are part of the educational curriculum and foster the physical and mental health and welfare of youth)". *Def.'s Suppl. Mem.* at 6. This, however, is not a justification apparent from the face of the statute and there is no evidence this was the justification at the time of the enactment of the ordi-

is conceded that public health and safety are compelling state interests, the City has not put forth any evidence, much less any argument suggesting political or other non-athletic events are more likely to create a hazard to public health and safety than athletic events.[16] In other words, the City fails to make any showing that the ordinance is either necessary or narrowly tailored. The MOGO, therefore, fails the strict scrutiny test.

b. Parade Ordinance

Plaintiffs characterize the permit requirement for marches under the Parade Ordinance as a "prior restraint on speech". *Pls.' Mot.* at 21. The

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nance. The justification, then, hardly meets the test of *Ward:* that the government's purpose behind the adoption of a statute is "the controlling consideration". 491 U.S. at 791.

[16] The City makes only one argument on this point and in passing: "The City is entitled to subsidize athletic events in the interest of the public good athletics do the community, and is not discriminating against any message Plaintiffs (or anyone else) is attempting to convey by doing so. The City's effort to promote athletic events is not content-based discrimination against the speech subject to the Mass Outdoor Gatherings Ordinance." *Def.'s Resp.* at 7 n.2. This argument tries to draw an analogy between waiving the permit fee (of the Parade Ordinance) for the Maine Chiefs of Police Association and waiving the permit requirement for athletic events in the MOGO. This analogy cannot stand. Unlike the parade ordinance, the MOGO discriminates *on its face.* The Parade Ordinance requires a permit fee of all organizations, and the City chooses to absorb the costs for certain organizations—arguably a subsidy. In contrast, the MOGO exempts certain organizations from the need to obtain a permit altogether—a content-based distinction.

City, in contrast, paints the requirement as a valid "time, place and manner" restriction. *Def.'s Resp.* at 1. The difference between parties' choice of labels again rests on the content-neutrality of the ordinance. In *Cox v. State of New Hampshire,* 312 U.S. 569 (1941), the Supreme Court considered the constitutionality of a law requiring marchers to obtain a license and pay a fee of not more than $300.00 before parading on public streets. *Cox* did not characterize that law as a "prior restraint," but rather upheld the law as a reasonable regulation of the "time, place, and manner in relation to the other proper uses of streets":

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of

> some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

Id. at 574, 576 (citations omitted); *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984). However, in cases such as *Forsyth County*, and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Supreme Court analyzed licensing and permit regulations as "prior restraints," rather than as time, place and manner regulations. Nevertheless, the Supreme Court in *Forsyth* noted that local governments may require permits for parades or rallies to regulate competing uses of public forum. *Forsyth*, 505 U.S. at 130.

The Supreme Court reconciled these seemingly contradictory precedents in *Thomas*. While the plaintiffs in *Thomas* argued the park-permit

ordinance constituted an unconstitutional prior restraint, the Court rejected a prior restraint formula:

> [T]he licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum. The Park District's ordinance does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say. Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park. The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event. As the Court of Appeals well put it: "[T]o allow unregulated access to all comers could

> easily reduce rather than enlarge the park's utility as a forum for speech."

534 U.S. at 322 (citation omitted). *See also Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004)("The Supreme Court has explicitly rejected attempts to analyze security-based time-place-manner restrictions as prior restraints. . . if content-neutral prohibitions on speech at certain places were deemed prior restraints, the intermediate standard of review prescribed in time-place-manner jurisprudence would be eviscerated")(citations omitted). Because the park-permit ordinance in *Thomas* did not concern itself with the content of the proposed speech, but rather was a "ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved," the Court upheld the ordinance as a time, place and manner licensing system. *Thomas*, 534 U.S. at 323 (citing *Poulos v. New Hampshire*, 346 U.S. 395, 403 (1953)). Under *Thomas*, the crucial difference between the two categories depends on whether the scheme is content-neutral or not and, therefore, in analyzing the parade ordinance, this Court returns to the question of content-neutrality.

Acknowledging the ordinance is content-neutral on its face, the Plaintiffs allege the City has applied the Parade Ordinance in a discriminatory manner by waiving the parade permit fee for the Maine Chiefs of Police Association's (Association) annual parade. Although the Plaintiffs admit that the waiver of the traffic control fee for the Association's annual parade "is understandable

given that the Augusta Police Department is a member organization and it administers the City's parade Ordinance," they contend the waiver constitutes unconstitutional viewpoint discrimination because it favors certain types of speech, such as "pro-police," over other types of speech, such as anti-war. *Pls.' Mot.* at 24-25. The City counters (1) a government subsidy for certain expressive activities, but not others, is constitutional; and, (2) a viewpoint discrimination claim requires proof of an intent to discriminate against speech because of its content, which is absent here. *Def.'s Resp.* at 7. The Plaintiffs retort that the City is not merely providing a subsidy for certain types of speech, but placing large financial obstacles against the exercise of speech—a fundamental difference. Plaintiffs challenge the authority of the City to subsidize speech based on content. *Pls.' Reply* at 5-7. They also contend the constitutional defect on the City's parade fee can be cured only by eliminating the burdensome fees altogether, or, at the very least, providing a waiver when the fees create a substantial hardship. *Id.* at 6.

The First Amendment guarantee of freedom of speech does not mean that the government must provide funds for or sponsor all speech equally. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1138 (6th Cir. 1991), *disapproved on other grounds by Forsyth County*, 505 U. S. at 129. This prerogative is limited only by the principle that the government may not selectively fund speech on the basis of its viewpoint when subsidizing the speech of private entities. *Rosenberger*

v. Rector & Visitors of the University of Va., 515 U.S. 819, 834 (1995); *Regan v. Taxation with Representation*, 461 U.S. 540, 548-50 (1983). For example, the Supreme Court upheld the constitutionality of a subsidy for certain speakers—veterans' organizations—when the distinction was not based on the content or messages of those groups' speech. *Regan*, 461 U.S. at 548 ("the veterans' organizations . . . are entitled to receive tax-deductible contributions regardless of the content of any speech they may use"). When the government itself is the speaker, or is using private entities to convey a governmental message, it is entitled to use public funds to do so, regardless of content-neutrality. *Rust*, 500 U.S. at 194; *Rosenberger*, 515 U.S. at 833.

By waiving the permit fee for the annual Association's parade, the City has not maintained or administered the Parade Ordinance to disfavor or suppress one viewpoint in favor of another. Rather, the City has used its funds to promote and facilitate a speaker deemed to be in the public interest. *See Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 879 (Cal. Ct. App. 1993)(holding the use of municipal funds to defray the cost of service charges for certain parades thought beneficial to the city not unconstitutional). As in *Regan*, it is the speaker rather than the viewpoint that provides the basis for the subsidy. Regardless of the particular message a given march by the Association may convey or be intended to convey to the public and regardless of the content of any such expression, the City has deemed the mere existence of an expressive march by the Associ-

ation to be in the public interest. Furthermore, the "Maine Chiefs of Police Association", if not a governmental entity or a private entity conveying a governmental message, comes close.[17] Under these principles, there is reason to conclude that the City is entitled to sponsor their speech.

Nor will this Court engage in hair-splitting by finding a constitutional difference between waiving a fee and paying it out of the City treasury. Either way, the City and more specifically its taxpayers bear the cost.[18] The permit fee is not discriminatorily applied: it is "imposed on all, but in some cases paid by the City." *See id.* "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae,* 448 U.S. 297, 317 n.19 (1980). The same issue was presented in *Stonewall Union,* wherein the organizers of a gay rights parade complained about the city's sponsoring and paying the fees of other parades. The Sixth Circuit, relying on *Harris,* stated:

> [A]lthough plaintiffs have a First Amendment right to parade on behalf of gay and lesbian rights, they do not have a right to demand that the City . . . sponsor that

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[17] The City is a member of the Association. *Gregoire Dep.* at 130:15-22.

[18] The City points out the actual cost is much lower for the Chiefs of Police parade, as the cost is shared with the Maine State Police and Capitol Security and the parade is very short. *Def.'s Resp.* at 9. Consequently, some of the cost reduction is based on a lower calculation of the cost of traffic control.

> right by paying their parade permit fees because it sponsors other speech-related activities. If defendants can adequately show that the parades which they have sponsored and for which they have paid the permit fees are reasonably related to the government function which the sponsoring department of the city government performs, the fact that the City . . . sponsors and pays the parade permit fees for certain activities related to government functions does not mean that the ordinance is discriminatorily applied.

931 F.2d at 1138. Likewise, here, although the Plaintiffs have a First Amendment right to hold a pro-peace and economic justice parade, they do not have a right to demand that the city of Augusta sponsor that right by paying the parade permit fees simply because it sponsors a speech-related activity closely related to its governmental function.[19]

Since Plaintiffs have failed to show that the Parade Ordinance is anything other than con-

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[19] Plaintiffs quote the following passage from *Regan:* "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation", 461 U.S. at 540, and argue that "unlike *Regan*, here the City is not merely refusing to subsidize the First Amendment activities of the Plaintiff, it is placing substantial obstacles, namely the imposition of large financial fees, in the path of their exercise". *Pls.' Reply* at 6. To the extent that Plaintiffs are challenging not merely a refusal to subsidize, but the imposition of permit fees altogether, this argument will be dealt with later in this opinion. *See supra* III.C.3.c.

tent-neutral,[20] the requirements in the ordinance will be analyzed as time, place and manner restrictions subject to less rigid scrutiny. In addition to the requirement of content-neutrality, time, place and manner restrictions are constitutional if they: (1) do not delegate overly broad licensing discretion to a government official; (2) are narrowly tailored to serve a significant government interest; and, (3) leave open ample alternative channels for communication of the information. *Forsyth County,* 505 U.S. at 130; *Thomas,* 534 U.S. at 323. The Court will examine each element.

2. Discretion

"[E]ven content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression." *Thomas,* 534 U.S. at 323. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk he will favor or disfavor speech based on its content. *Id.* (citing *Forsyth County,* 505 U.S. at 131). "The dangers of discretion are particularly evident in parade per-

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[20] Because the City may constitutionally subsidize the Maine Chiefs of Police Association's annual parade without it constituting viewpoint discrimination, it is unnecessary to reach its next argument, based on *McGuire,* that Plaintiffs failed to show any discriminatory intent on the part of legislators, and consequently the claim of viewpoint discrimination should fail. 386 F.3d at 63; *Def.'s Resp.* at 9-10. It is equally unnecessary to reach Plaintiffs' responsive argument that the cases cited by the City do not apply in "traditional public forums". *Pls.' Reply* at 6-7.

mit schemes, where waivers will often be sought for politically controversial causes. It is precisely when 'political and social pressures' are most likely to affect decisionmaking that objective standards to govern discretion are most essential." *N.A.A.C.P. v. City of Richmond,* 743 F.2d 1346, 1357 (9th Cir. 1984). Therefore, the Supreme Court requires that permitting requirements contain narrow, objective, and definite standards to guide the licensing authority. *Forsyth,* 505 U.S. at 131 (citing *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969)).

The Plaintiffs contend that the Parade Ordinance fails this test because (1) there are no written guidelines or formula for determining the number of police officers for traffic control; (2) there are no criteria for determining when there is "good cause" to waive the thirty-day notice requirement;[21] and, (3) the requirement that a parade applicant meet with the Police Chief before the event and "attempt to agree on the details of the route and other logistics" is too vague and subjective. *Pls.' Mot.* at 25-30.

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[21] MOGO has parallel provisions to the traffic control and good cause waiver sections in the Parade Ordinance. Sec. 3-116(b); Sec. 3-120. Because this Court has held that the MOGO discriminates based on content and fails strict scrutiny, there is no need to address the MOGO under the less onerous time, place and manner standard of review. However, given the similarities between these provisions, the Court notes that its holding on the discretionary provisions of the Parade Ordinance applies to the MOGO as well.

a. Traffic Control Fee

The Plaintiffs argue that the Augusta Police Department's determination of the estimated cost of traffic control "relies heavily on a judgment call about the number of officers that are required to provide traffic control" because the Police Department "has never established any written criteria or formula for calculating the number of officers or vehicles as part of its estimate of the traffic control cost." *Pls.' Mot.* at 26. Plaintiffs suggest this "broad subjectivity and discretion" is illustrated by the Police Department's increase of "its estimate by twenty percent, from eight to ten, for the number of police officers needed to provide traffic control for the parade route used on April 8, 2003 when the same exact route was proposed for the March 20, 2004 parade." *Id.* at 26-27. They argue the lack of any standards for calculating the number of police officers required for traffic control "magnifies the danger that the police department will impermissibly assign more police officers (and thus charge a higher fee) for traffic control when the proposed parade is controversial and a counter-demonstration or opposition activities are expected." *Id.*

As long ago as *Cox*, the Supreme Court held that a state may require, as a condition to engaging in expressive activity, a permit applicant pay fees to defray policing costs directly attributable to the speech activity. *Cox*, 312 U. S. at 576-77. *Cox* upheld a fee that ranged from "$300 to a nominal amount" and was intended "to meet the expense incident to the administration of the [licensing] act and to the maintenance of public

order in the matter licensed." *Id.* Since *Cox,* courts have refined this general rule, subjecting license and fee requirements to closer constitutional analysis.

In *Forsyth County,* the Supreme Court considered a facial challenge to a county ordinance that required permits for private demonstrations and other uses of public property and imposed a fee of up to $1,000 to meet the expense of the ordinance's administration and the maintenance of public order. The Supreme Court found the ordinance unconstitutional because it granted unfettered discretion to the county administrator charged with setting the permit fee, and because the ordinance, by taking into consideration the costs of "necessary and reasonable protection of persons participating in or observing said . . . activity", arguably based the fee in part on the content of the speech. 505 U.S. at 132-34; *see also City of Lafayette,* 1995 WL 870959, at *4 n.9 (the ordinance granted excessive discretion to the police chief to determine fees where the police chief was required to estimate the city personnel hours necessary to control traffic "or otherwise monitor the special event").

In *Stonewall Union,* the ordinance provided that the following factors must be considered in determining the number of officers necessary for policing a parade: time, date, route, length, number of participants, and vehicles. 931 F.2d at 1135. Furthermore, a police lieutenant stated by affidavit that the standard criteria used to determine the optimal number of police officers included: (1) the proposed route and the designated route for the parade; (2) the time of day

that the event is to take place; (3) the date and day of the week proposed; (4) the general traffic conditions in the area requested, both vehicular and pedestrian; special attention given to the rerouting of the vehicles or pedestrians normally using the requested area; (5) the number of marked and unmarked intersections along the route requested, together with the traffic control devices present; (6) if traffic must be completely rerouted from the area, then the number of marked and unmarked intersections and the traffic control devices; (7) the estimated number of participants; (8) the estimated numbers of viewers; (9) the nature, composition, format and configuration of the parade or run; (10) the anticipated weather conditions; and (11) the estimated time for the parade, run or event. *Id.* The Sixth Circuit found the factors to be "objective and definitive standards related to traffic control to guide the licensing authority and prevent unfettered discretion." *Id.*

Here, Major Gregoire stated in his affidavit that the amount of traffic control "is based only on factors which are completely unrelated to the message to be communicated by marchers" and include the route to be taken, the duration of the route, the estimated number of people who will attend, whether marchers intend to close the entire road or only one direction of travel, and whether there are any other events or special circumstances within the City which could affect traffic.[22] *Gre-*

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[22] Plaintiffs urge this Court to disregard these factors:

> During discovery in this case, the Plaintiffs attempted to clarify what criteria the City

goire Supplemental Aff. ¶6. However, the ordinance, unlike the ordinance in *Stonewall,* does

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> uses to calculate the traffic control fee charged as part of the parade permit. In particular, the Plaintiffs served the following Interrogatory #3: "Identify in as much detail as possible the standards, criteria or formula, if any, used by the persons identified in your answer to question two to calculate the permit fee for the 'March for Peace & Justice' held in Augusta on March 20, 2004." . . . . The City, however, did not disclose the six-factor test cited by its lawyer in the City's March 15, 2004 brief. Rather, the City responded as follows: "The hourly cost for overtime police detail has been established by the City Police Department based on the supervisor's collective bargaining agreement. The hourly rates are standard for all overtime detail. A city map of Augusta is used in the process of determining the traffic costs. The necessary traffic details are determined by Major Gregoire by considering the route taken." That interrogatory answer was signed by Major Robert Gregoire on July 20, 2004. Similarly, at its deposition on October 6, 2004, the City, speaking officially through Major Gregoire, testified that the Defendant's Answer to the Plaintiffs' interrogatories had been carefully reviewed by him and that he had made sure that "the answers were completely accurate before [he] signed under oath." . . . . At the same deposition, Major Gregoire also testified that he made his estimate of the traffic control cost fee based on his experience and judgment, and he did not disclose any more specific criteria.

Pls.' Reply at 7-8. Plaintiffs contend that, after discovery was completed, the City could not change, without expla-

not explicitly incorporate the objective standards and criteria the Police Chief claims he used when determining traffic control costs. Sec. 13-5(e)(referring merely to the "costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Depart-

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nation, its sworn answers about the criteria it uses to set the traffic control fee for a parade permit. *Id.* at 8. Plaintiffs also proffer that the City's sworn answers to the interrogatories and its deposition testimony prove that at least through 2004 the City was not following the six-factor test it now claims to use in setting the traffic control fee, and the "only reasonable conclusion is that the City's claimed criteria are not 'embodied in well-established practice' or otherwise 'definite' enough to pass constitutional muster." *Id.* at 9.

When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not satisfactorily explain why the testimony is changed. *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994)(citations omitted); *Torres v. E.I. Dupont de Nemours & Co.*, 219 F.3d 13, 20-21 (1st Cir. 2000) *LaMarche v. Metropolitan Life Ins. Co.*, 236 F. Supp. 2d 34, 40-42 (D. Me. 2002). In this case, Major Gregoire's supplemental affidavit does not contradict either his deposition testimony on the issue of the factors applied or the City's answers to interrogatories on the same question. Although the supplemental affidavit contains additional, more specific factors than those found in Major Gregoire's deposition or in the City's answers, the sworn testimonies are not inconsistent. This Court will consider the six factors set forth in Major Gregoire's supplemental affidavit. *See Buckner v. Sam's Club*, 75 F.3d 290, 292 (7th Cir. 1996)("supplemental affidavits can be employed to clarify ambiguous or confusing deposition testimony"). This Court agrees, however, that the recent elaboration of this test bears on whether it was part of the City's well-established practice.

ment"). Nor, especially given Major Gregoire's recent elaboration of the criteria in a supplemental affidavit, are these criteria well-established. The City asks us to assume the Police Chief will consider only these objective factors when assessing the traffic control fee and he will act in good faith and adhere to standards absent from the ordinance. But this is "the very presumption" the doctrine forbidding unbridled discretion disallows, as "the doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood,* 486 U.S. at 770 (citations omitted). Here, since the ordinance is silent; it is not the place of this Court to speak for it. This part of the ordinance is unconstitutional, because the City has failed to demonstrate its calculations are grounded on the text of the ordinance, binding construction, or well established practice.

b. Waiver of Thirty-Day Notice Requirement for "Good Cause Shown"

Advance notice provisions "drastically burden free speech." *Grossman v. City of Portland,* 33 F.3d 1200, 1206 (9th Cir. 1994)(citations omitted). The procedural hurdle of filing permit applications and the temporal hurdle of waiting for permits to be granted discourages potential speakers. *Id.* The harms of advance notice requirements are particularly pointed in parade registration schemes: "[T]iming is of the essence in politics. . . . [W]hen an event occurs, it is

often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth,* 394 U.S. at 163 (Harlan, J., concurring). A delay "of even a day or two" may be of crucial importance when applied to " 'political' speech in which the element of timeliness may be important." *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175, 182 (1968)(quoting *A Quantity of Books v. Kansas,* 378 U.S. 205, 224 (1964)(Harlan, J. dissenting). More specifically, in the context of parades, the Ninth Circuit stated:

> Participatory enthusiasm is vital to their success. The size of a crowd and its enthusiasm for a cause may generate sufficient passion to sway the undecided. Thus, simple delay may permanently vitiate the expressive content of a demonstration. A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the "same" parade 20 days later. The later parade can never be the same. Where spontaneity is part of the message, dissemination delayed is dissemination denied.

City of Richmond, 743 F.2d at 1356.

The advance filing requirements that courts have upheld for parades or demonstrations have generally been less than a week. *See, e.g., A Quaker Action Group v. Morton,* 516 F.2d 717, 735 (D.C. Cir. 1975)(two-day advance notice requirement is reasonable for use of National

Park areas in the District of Columbia for public gatherings); *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968)(two-day advance notice requirement for parade is reasonable); *Progressive Labor Party v. Lloyd*, 487 F. Supp. 1054, 1059 (D. Mass. 1980)(three-day advance filing requirement for parade permit approved in context of a broader challenge); *Jackson v. Dobbs*, 329 F. Supp. 287, 292 (N.D. Ga. 1970)(marchers must obtain permit by 4:00 p.m. on day before the march), *aff'd*, 442 F.2d 928 (5th Cir. 1971); *Handley v. City of Montgomery*, 401 So. 2d 171, 183-84 (Ala. Crim. App. 1981)(filing requirements that have the result of requiring applications between four and eleven days before the event, and nine days for the plaintiff, is reasonable given the need for advance planning).

In contrast, advance filing requirements for parade permits for longer periods have been held to violate the First Amendment because municipalities have been unable to demonstrate the need for them. *See Sauk County v. Gumz*, 2003 WI App 165, ¶40, 266 Wis. 2d 758, 800, 669 N.W.2d 509, 531 (Wis. Ct. App. 2003)(providing a similar list of authority and concluding that "there is nothing in the record from which we can conclude that forty-five days is a reasonable time period for processing the application or that sixty days is a reasonable filing requirement"); *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605-607 (6th Cir. 2005)(provision requiring thirty days notice is overbroad and is not saved by an unwritten policy of waiving the provision); *Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir.

1996)(city's asserted goals of protecting pedestrian and vehicular traffic and minimizing inconvenience to the public does not justify five-day advance filing requirement for any parade, defined as ten or more persons); *City of Richmond,* 743 F.2d at 1355-57 (twenty-day advance filing requirement for parade permit not supported by evidence; police and traffic concerns can be addressed in a much shorter time period; and research indicated that other municipalities had much shorter time periods); *City of Long Beach,* 17 Cal. Rptr. 2d at 871 (thirty working days); *York v. City of Danville,* 152 S.E.2d 259, 263-64 (Va. 1967)(no evidence that the requirement that the application for a parade permit be made between thirty and sixty days before the proposed event was necessary to prepare for policing of streets or regulation of traffic).

Although the ordinances here provide for a waiver of the thirty-day notice requirement for "good cause shown," *cf. City of Dearborn,* the Plaintiffs argue there are no articulated standards either in the ordinance or in the City's established practice for what constitutes good cause. *Pls.' Mot.* at 29. In its deposition, the City admitted that it had no criteria, written or unwritten, for determining whether to grant a "good cause" waiver of the thirty-day notice requirement. *Gregoire Dep.* at 68:22-69:12. Specifically, Major Gregoire stated: "I just think it's too open to discretion as to when you choose and not choose. You'd have to take it on a case-by-case basis because there are—I think the major portion of that would be just on what is needed to do the event for personnel." *Id.* at 69:1-

5. In his supplemental affidavit, Major Gregoire firmed up his earlier opinion that "if I could provide the people, I could probably provide the event", *Gregoire Dep.* at 69:20-21, by averring, "[a]s long as the Police Department is physically able to contact the officers and make the appropriate arrangements to close the road and have the appropriate traffic officers on duty, the City would not deny the permit based on the timing of the application." *Gregoire Supplemental Aff.* ¶ 18.

By failing to provide standards and guidelines for determining good cause, the waiver provisions convey excessive discretion to the Police Chief to exempt or not to exempt certain applicants from the thirty-day notice requirement. The City's deposition supports the conclusion that the Police Chief has unfettered discretion to grant or deny a waiver. In Major Gregoire's Supplemental Affidavit, the City attempts to narrow the construction of the waiver provision to save it from constitutional infirmity by establishing a guideline for determining whether to grant a waiver for good cause. As before, this Court will not read nonbinding criteria into a statute granting unbridled discretion to determine "good cause". Accordingly, this part of the ordinance is unconstitutional because it invests overly broad discretion in the licensing authority.[23]

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[23] Plaintiffs raise a third argument, arguing the provision requiring parties to meet and "attempt to agree" with the Police Chief on logistics is overly discretionary, allowing the Police Chief to deny a permit for failure to attempt to agree. Sec. 13-5(c); *Pls.' Mot.* at 30. The Court agrees with the City that to read discretion into this provision would manufacture an issue where there is none. The ordinance

3. Overbreadth

The Plaintiffs allege the Parade Ordinance is not narrowly tailored to serve a significant governmental interest—either as applied or on its face. They say that because the ordinance mandates an applicant meet with the Chief of Police and "attempt to agree" on parade logistics, it is not narrowly tailored on its face. *Pls.' Mot.* at 32-33. Also, they claim that because it adds a surcharge for profit when calculating a traffic control fee, the ordinance is overbroad as applied. *Pls.' Mot.* at 34. The Plaintiffs also contend that the lack of any exception or reduction to the permit fee for citizens or groups for whom the fee causes a substantial hardship is not necessary to achieve a legitimate governmental interest and, moreover, leaves those citizens and groups without "open, ample alternatives for communication." *Pls.' Mot.* at 35-37. Defendant responds that the ordinance is not overbroad, and serves the substantial governmental interest of public safety and traffic control. *Def.'s Resp.* at 18.

To reiterate, a regulation of the time, place, and manner of protected speech must be narrowly tailored to serve a significant governmen-

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would hardly be preferable if it required parties to agree on logistics—to agree to proceed as the Police Chief wished, and to pay a fee for the privilege of doing so—and the insertion of the qualifier "attempt" is merely a recognition of that fact. The ordinance provides that parties must meet with the Chief to discuss and attempt to agree on logistics. There is nothing that would suggest that the Police Chief has authority to deny a permit based on failure to "attempt to agree", if the meeting is held, and there is no evidence that the City has ever interpreted it as such. *Def.'s Resp.* at 16-17.

tal interest and must leave open ample alternative channels for communication. *Forsyth,* 505 U.S. at 130. A regulation is narrowly tailored if "the means chosen are not substantially broader than necessary to achieve the government's interest". *Ward,* 491 U.S. at 800 *(accord Bl(a)ck Tea Soc'y,* 378 F.3d at 12). To satisfy this benchmark, a regulation need not be the least restrictive alternative available to the government, but must promote a substantial government interest that would be achieved less effectively absent the regulation. *Ward,* 491 U.S. at 798-99. Maintenance of public order is a substantial government interest which may under certain circumstances support regulation of the use of public streets for parades. *See Cox,* 312 U.S. at 574.

As an initial matter, it is indisputable that the Parade Ordinance restricts access to a public forum. "Public streets are the prototypal example of a public forum." *City of Richmond,* 743 F.2d at 1355; *see also Hague v. CIO,* 307 U.S. 496, 515 (1939)("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). Because the Parade Ordinance restricts access to the streets, it is subject to a particularly high degree of scrutiny. *City of Richmond,* 743 F.2d at 1355. Public fora cannot be put off limits to First Amendment activity solely to spare public expense, *see Schneider v. State,* 308 U.S. 147, 162 (1939), nor can laws regulating public fora be held constitutional simply because they leave

potential speakers alternative fora for communicating their views. *See id.* at 163; *City of Richmond,* 743 F.2d at 1355; *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556 (1974). "Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales." *City of Richmond,* 743 F.2d at 1355.

a. Meet and Attempt to Agree Provision

The Plaintiffs proffer that the Parade Ordinance's requirement that the applicant must meet with the Police Chief and attempt to agree on parade logistics is not narrowly tailored to serve the significant governmental interests because: (1) requiring an in-person meeting with the Police Chief creates another time barrier to a citizen who is seeking to promote a spontaneous or prompt demonstration in response to a time-sensitive issue or event, especially in the case, as here, where the applicant has already provided specific and detailed information about the requested parade route; and, (2) the details of the route may be an important part of the applicant's expressive activity and therefore the applicant should not be required to negotiate with the government about the manner of expression. *Pls.' Mot.* at 33-34.

It is true that like the advance notice requirement, the in-person meeting provision has the potential to substantially inhibit speech, because one must inform the Police Chief of details about his or her desire to speak. By imposing delay for

a meeting with the Police Chief as a condition to permitting a parade, the government inhibits spontaneous expression and thus a certain type of speech. Most significantly, the in-person meeting requirement invites subjective assessments, and applicants who are uncomfortable dealing directly with the Police Chief may be discouraged from applying for a parade ordinance altogether. Plaintiffs' example, of an applicant wishing to protest alleged civil rights abuses by police, is well taken.[24] *Id.* at 33. Although there is a significant governmental interest in preventing parades from obstructing traffic and causing other safety concerns, the in-person meeting

[24] There are numerous examples. The Chief of Police, after all, is the person the City has charged to investigate crime and enforce the law and the applicant could suffer an understandable reluctance to meet with the Chief, if the parade's message is unconventional, unpopular or stridently anti-authority. For example, if the parade promoter wished to protest current drug laws, a mandatory pre-parade, face-to-face meeting with the Chief of Police could well be a deterrent. But, the most obvious example emanates from the civil rights movement and the Selma March. Judge Frank M. Johnson, Jr. entered a temporary restraining order on March 19, 1965, enjoining then Governor George Wallace and other officials of the state of Alabama from "intimidating, threatening, coercing or interfering with the proposed march. . . ." *Williams v. Wallace*, 240 F. Supp. 100, 109 (D. Ala. 1965). Judge Johnson concluded that the "attempted march alongside U.S. Highway 80 from Selma, Alabama, to Montgomery, Alabama, on March 7, 1965, involved nothing more than a peaceful effort on the part of Negro citizens to exercise a classic constitutional right; that is, the right to assemble peacefully and to petition one's government from the redress of grievances." *Id.* at 105.

requirement chills substantially more speech than is necessary to achieve that end.[25]

b. Surcharge as Part of Traffic Control Fee

The Plaintiffs also argue that a fee in excess of the amount paid to the police officers for traffic control is overbroad. *Pls.' Mot.* at 34. Major Gregoire testified that the City estimates the cost of traffic control before knowing which officers will be available for the overtime needed for a parade traffic control detail; however, he also noted that certain aspects of the process, such as his time to schedule and organize, are not billed. *Gregoire Dep.* at 102:25-106:23. The City pays the police officers assigned to the parade a minimum overtime shift of four hours per its collective bargaining agreement. *Gregoire Supplemental Affidavit* ¶ 8. Major Gregoire admitted the City "may make some profit" on the traffic control charge depending on which officers work and the "actual cost is less than what we bill". *Gregoire Dep.* at 98:22-99:3; 166:1-8. The record shows that the City charged Mr. Sullivan $478.55 more than its actual overtime payments. PSMF at ¶ 44; RPSF at ¶ 44. There is no evidence that the difference is equal to or greater than the cost incurred by the City, as Defendants asserts, for "considerable administrative and overhead time". RPSF at ¶ 44; *E. Conn. Citizens Action Group v.*

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[25] This opinion does not affect the citizen who wishes to meet with the Chief of Police to resolve any logistical or other issues. The problem is the mandatory nature of the meeting.

Powers, 723 F.2d 1050, 1056 (2d Cir. 1983), *questioned on other grounds as stated in Van Arnam v. GSA*, 332 F. Supp. 2d 376 (D. Mass. 2004).

Ordinarily, a government cannot profit by imposing licensing or permit fees on the exercise of a First Amendment right. *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1993); *Cox*, 312 U.S. at 577. Only fees that cover the administrative expenses of the permit or license are permissible. *E. Conn. Citizens Action Group*, 723 F.2d at 1056; *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1975). *See also Cox*, 312 U.S. at 577 (approving of a fee "limited to the purpose stated" of meeting "the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed"); *Northeast Ohio Coal. v. City of Cleveland*, 105 F.3d 1107, 1110 (6th Cir. 1997)("license or permit fee . . . does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred. . ."). A fee in excess of the amount necessary to offset these costs is impermissible. *E. Conn. Citizens Action Group*, 723 F.2d at 1056; *Moffett v. Killian*, 360 F. Supp. 228, 232 (D. Conn. 1973)(holding that Connecticut cannot collect a fee in excess of that amount "actually needed" to defray the costs of administering legitimate regulation of First Amendment activity).[26] In contrast to this Court's

[26] Outside the Eleventh Circuit, there is very little support for Plaintiffs' position that the fee must be nominal, *Pls.' Mot.* at 35, nor is that position in line with *Cox*. *See Stonewall Union*, 931 F.2d at 1136 ("Plaintiffs argue that under the First Amendment only a nominal fee may be charged for a parade license and the Columbus ordinance is

earlier conclusion that "the record establishes that the police fee is simply a mathematical computation based on the Police Chief's assessment of the police presence necessitated by the parade route", *Sullivan,* 310 F. Supp. 2d at 354, further discovery has revealed that the computation does not bear a direct or precise relationship to the actual costs incurred. It is, therefore, overbroad.[27]

c. Disparate Impact on the Indigent

The Plaintiffs contend the ordinances are unconstitutional on their face and as applied because they do not provide any exception or reduction to the large permit fee for citizens or groups for whom the fee causes a substantial hardship. They argue the lack of a financial

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unconstitutional because it does not limit charges to nominal amounts. Plaintiffs rely on [*Cent. Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. 1985)] for this proposition, but we believe this case misreads *Cox* as permitting only nominal charges for policing a parade. The fee approved in *Cox* was not nominal, but instead ranged 'from $300 to a nominal amount.' 312 U.S. at 576."); *Forsyth,* 505 U.S. at 136-37 (examining *Murdock* and *Cox* and noting *Murdock* "does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible. It reflects merely one distinction between the facts in *Murdock* and those in *Cox.*").

[27] In *Cent. Fla. Nuclear Freeze Campaign,* the Eleventh Circuit determined that the "charging of overtime payment for police salaries is not the least restrictive means of achieving the governmental concerns of protecting the public safety", as a city could use reasonable alternatives, such as "reserve police officers, who are not entitled to contractual overtime pay", to keep costs down. 774 F.2d at 1526.

exemption burdens more expressive activity than necessary and leaves those citizens and groups unable to pay the fee without "open, ample alternatives for communication." *Pls.' Mot.* at 35-37.

The ordinances do not take into account the ability of the applicant to pay the fee. Nor does the evidence indicate that the Police Chief, in his or her discretionary capacity of assessing the total permit fee, considers the ability of the applicant to pay such fee. PMSF at ¶55. Although the City's permit schemes provide for a review of a denial of a permit before the City Council, *see* Sec. 13-5(g), there is no provision that exempts persons, who are unable to pay, from paying the costs for police protection. The granting of a permit on the basis of the ability of persons to pay an unfixed fee for police protection, without providing for an adequate alternative means of exercising First Amendment rights, is unconstitutional. *Murdock*, 319 U.S. at 111 ("Freedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way.").

In *Van Arnam*, a case involving an organization wishing to protest on JFK Plaza in Boston, Judge Woodlock held that, "although Van Arnam is not 'indigent,' acceptance of the *ex ante* financial burden of a $1,000 (or greater) insurance premium, or the more diffuse (but potentially far greater) burden of unlimited personal liability, would be a serious financial burden for her—one that could (and in fact did) completely deter her from speaking on federal property." 332 F. Supp. 2d at 406. He concluded that the indemnification clause imposed financial demands that burdened

the expressive activities of those without sufficient financial means more than necessary to achieve legitimate governmental interests. *Id.*

Other courts have found that indigent persons are denied an equal opportunity to be heard if as a consequence of the added costs of police protection, they are unable to pay the charge for exercising their First Amendment rights. *Cent. Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985)(holding city ordinance unconstitutional in part because there was no provision exempting indigents from paying the costs for additional police protection); *Invisible Empire of the Knights of the Ku Klux Klan v. Town of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988)(requirement of reimbursing town for police protection and cleanup was unconstitutional because it was not "waived or modified for indigents"); *Wilson ex rel. U.S. Nationalist Party v. Castle*, No. 93-3002, 1993 WL 276959, at *4 (E.D. Pa. July 15, 1993)(insurance requirement was not narrowly tailored as applied to persons "who are financially and otherwise unable to obtain coverage"); *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1435 (D. Conn. 1985)(bond requirement was unconstitutional as applied to those who can demonstrate their inability to obtain a bond).

However, some courts have held the mere absence of an indigency exception is not fatal, particularly if the failure to prepay the additional police charges does not preclude the applicants from engaging in the constitutionally protected activity. *Stonewall Union*, 931 F.2d at 1137. In *Stonewall Union*, the Sixth Circuit con-

cluded an indigency exemption or waiver was not required for a parade ordinance when the sidewalks and parks of the city were available without charge for related speech activities. *Id.* Likewise, in *Sauk County*, the court reviewed an ordinance that required a license for large assemblies (over 1,000 people) lasting more than eighteen hours and agreed with *Stonewall Union*, holding that the plaintiff had ample alternative means of assembling and speaking to express his views. *Sauk County* noted that the plaintiff provided it with no "authority that persons are constitutionally entitled to hold a gathering of the size and duration covered by this ordinance if they are unable to pay for reasonable costs associated with the application for a license or the assembly itself, when those charges for the costs are imposed without regard to the content of speech." 2003 WI App. 165 at ¶ 57.[28]

[28] In addition to legal arguments, Defendant claims an indigency exception would be "unworkable in practice and bad policy", as "virtually any group could find an indigent person to sponsor an event", making it an exception which swallows the rule. *Def.'s Resp.* at 30. An exception would also raise problems of intrusive and complex evidentiary inquiries and line-drawing, and would force City taxpayers to fully subsidize speech by paying for the police resources necessary to close the streets to traffic. *Id.* at 31-32. This Court is skeptical of the City's parade of horribles, given that it has found other fee waiver policies practicable, albeit on a much smaller scale. PMSF ¶¶ 57-58; *Dep. of Leif Erik Dahlin* (Docket # 56—Attach. 5). Further, literally thousands of determinations of indigency are routinely and daily made in the administrative agencies and courts of this country. The question is not so much whether the exception would swallow the rule, but whether the rule would swallow the right.

At issue here is whether the sidewalks and parks of a city represent a reasonable alternative to parades. When evaluating whether there are open, ample alternatives, the First Circuit has reminded us that "the lens of inquiry must focus not on whether a degree of curtailment exists, but on whether the remaining communicative avenues are adequate". *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n.*, 100 F.3d 175, 193 (1st Cir. 1996)(quoting *Nat'l. Amusements*, 43 F.3d at 745). Furthermore, "the First Amendment does not guarantee a right to the most cost-effective means of distribution or the rent-free use of public property" and "some diminution in the overall quantity of speech" may be tolerated when evaluating whether or not there are adequate alternatives. *Id.* at 193-94.

The City claims there are several adequate alternatives available to Plaintiffs and others without financial means, including: sidewalk marches, rallies on the State House steps, and mass gatherings. *Def.'s Resp.* at 5. This Court has carefully considered *Stonewall Union* and progeny, but ultimately reaches the opposite conclusion. The Plaintiffs developed a persuasive argument, based on the expert opinions of Joe H. Bandy, III, an Assistant Professor of Sociology at Bowdoin College, underpinning their position that the ordinances do not adequately allow for alternative means of effectively communicating their message [29] According to Assistant Professor

[29] Assistant Professor Bandy has special expertise in the study of social movements and bases his opinions on "his knowledge of the writings and findings of other experts in the study of social movements, and his own research and

Bandy, there are several reasons a march offers advantages over more stationary forms of expression: (1) a moving march allows demonstrators to bring their protest message to a variety of different audiences; (2) a march may more greatly inconvenience the general public [by, for example, blocking streets] and therefore be more likely to gain the attention of media; (3) a march has positive connotations because of the American tradition of successful marches, such as the 1963 March on Washington; and, (4) the march is

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experience as a scholar in the field". PSMF at ¶¶ 1-2. The City objects to Assistant Professor Bandy's opinions on several grounds: (1) he has no training or background in specifically assessing the impact of any particular parade ordinance, and more specifically, the city of Augusta's ordinances; (2) his opinions "go to an issue not in dispute in this case, whether it is good policy to give parades/street marches First Amendment protection"; (3) he does not have sufficient qualifications to offer some of his opinions; and (4) several of his opinions are not "an appropriate subject for expert testimony". RPSF at ¶¶ 1-12. This Court has already determined that whether a sidewalk or rally is an acceptable alternative to a street parade presents a proper issue. Further, the study of social movements is recognized by the American Sociological Association as a subspecialty, which implies that opinions on social movements are appropriate matters for expert testimony, even if laymen also may have opinions on the subject. *Dep. of Joe Bandy* at 7-8 (Docket # 56—Attach. 3). Assistant Professor Bandy has a Ph.D in sociology, and social movements are his specialty area. *Id.* He is qualified to provide opinions on the issue of the effectiveness of methods of protest, and his opinions "assist the trier of fact to understand or determine a fact in issue". *Ruiz-Troche v. Pepsi-Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 80 (1st Cir. 1998). Therefore, this Court has examined Assistant Professor Bandy's opinions on the effectiveness of various forms of social expression.

more effective at promoting camaraderie and movement-building. *See* PSMF at ¶¶ 4-7.

Besides having less symbolic significance, sidewalk marches are an inadequate substitute for logistical reasons. The demonstration would be narrower, which would not allow for wide placards or banners to be carried and may make the march look smaller. The procession's narrowness may dampen camaraderie by preventing people from marching side-by-side with a critical mass of fellow protestors. A sidewalk march would not interrupt traffic and disrupt routines, and would likely not garner as much attention. *See* PSMF at ¶¶ 9-12.[30] To the extent the march interrupts traffic (i.e. when marchers were forced to cross intervening streets), the march would be less safe than a parade where traffic is stopped and there is a police presence. Safety concerns may deter some would-be participants. *Pls.' Reply* at 16. Moreover, the march might be forced to halt altogether to let traffic pass. *Pls.' Reply* at 17. Finally, despite the City's proffer of a sidewalk march as a reasonable alternative, the Parade Ordinance arguably applies to sidewalk marches, since its permit requirements encompass the "use of public ways within the city". Sec. 13-5(a); *Pls.' Reply* at 18.[31]

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[30] The City argues that since a sidewalk march is visible to passing motorists, it is more likely to get a message out to the public than a parade in which streets were blocked off. RPSF at ¶ 10. This could be true, but passing motorists are not the sole or necessarily the primary persons to whom the message of a parade is commonly directed.

[31] Defendant asserts that the Parade Ordinance would not apply to a sidewalk march. *Def.'s Resp.* at 5; *Gregoire*

This Court finds support for Plaintiffs' position in the line of authority holding that public streets are traditional public fora and that "the government must bear an extraordinarily heavy burden to regulate speech in such locales." *City of Richmond*, 743 F.2d at 1355.[32] More specifically, since "the streets are natural and proper places for the dissemination of information and opinion . . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place". *Schneider*, 308 U.S. at 163. Because Plaintiffs have set forth a compelling case, supported by expert testimony, as to why Defendant's proffered alternatives are inadequate for expressive purposes, because the sidewalk march is at least arguably covered by the language of the Parade Ordinance, and finally, because of the importance accorded freedom of speech in traditional public fora, this Court concludes that the Parade Ordinance does not provide open and ample alternatives for communication. To block indigents from using the public streets to convey their message, by pointing out channels of communication that may be used free of charge, but are inadequate, is unconstitutional. It is the equivalent of a determination that those who cannot afford to pay the fee either have a less important message to convey

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Supplemental Aff. ¶¶ 10, 22. However, by its terms, the ordinance applies to "an intended parade, march, or other use of a public way", § 13-5(a), and the City admitted a sidewalk is a public way. PSMF at ¶64; RPSF at ¶64.

[32] *See* discussion *supra* section III.C.3.

or must convey it in a less effective way. Consequently, the Parade Ordinance must afford a fee waiver for those unable to pay.

D. Final Considerations: Abstention and Saving Constructions

This Court does not lightly declare unconstitutional the provisions of a duly-enacted municipal law. The citizens of the city of Augusta have a right through their elected representatives to order their affairs to minimize the impact of parades and marches on those citizens who are not participants and to maintain civic safety and order. Further, to the extent the City will be required to provide police protection for those marchers who cannot afford to pay, the financial onus of securing the First Amendment rights of their fellow citizens falls disproportionately upon the citizens of Augusta. It is also true that although the protections of the First Amendment apply with equal force throughout this country and state, the citizens of a capital city, as the seat of governmental authority, are more likely to be subject to public challenges to the exercise of that power. This Court is obligated to determine whether it should avoid the constitutional issue by abstaining and allowing the state courts to interpret the provisions in a manner that could save them or alternatively to do so itself. Ultimately, however, the obligation to enforce the freedoms of the Bill of Rights applies with special force to the federal courts and to shirk this duty would itself be to violate the Constitution this Court is sworn to uphold.

Abstention or certification may be proper to "save" a state law by allowing state courts the opportunity to give the challenged statute a definitive and potentially constitutional construction.[33] *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-76 (1989). However, as elaborated by *Jews for Jesus*, this doctrine is not always applicable, particularly when the resolution is not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question". *Id.* at 375. *See also White v. Edgar*, 320 A.2d 668, 675 (Me. 1974)("That the State statute under attack . . . may reasonably be deemed susceptible of a limiting construction by the State Court which will avoid, or modify, the federal constitutional issue has long been recognized to warrant federal abstention").[34] Crucial to the application of abstention is whether the state law is ambiguous in some material way or whether it presents difficult questions of state law. *See Dionne v. Bouley*, 583 F. Supp. 307, 310-11 (D.R.I. 1984)(citations omitted). However, the First Circuit has stated that "a vagueness challenge to a state law does not call for abstention; a plaintiff is entitled to the forum of his choice".

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[33] Neither party moved for certification; however, Rule 25(a) allows this Court to submit a certified question to the Law Court "upon its own motion or upon request of any interested party." Me. R. App. P. 25(a).

[34] In *White*, the Maine Law Court noted it had jurisdiction to respond to a certified question of state law "one alternative answer to which, as the answer forthcoming from this Court, will produce a final disposition of the federal cause". *Id.* at 676.

Wishart v. McDonald, 500 F.2d 1110, 1114 (1st Cir. 1974).

This Court has found unconstitutional the 30-day notice requirement found in section 13-5(a)("No less than thirty (30) days prior to an intended parade, march or other use of public ways within the city, a permit must be applied therefore . . . The City Manager may allow a shorter time frame for good cause shown") and 3-116(b)("The application . . . must be submitted no less than thirty (30) days prior to the mass gathering, unless the City Manager allows a shorter time frame for good cause shown"), on the grounds that thirty days is far broader than necessary to meet the City's purposes and there are no standards in the ordinance regarding when the thirty-day limit may be abandoned. *See infra* III.C.2.b. The thirty-day requirement is as clear as day, and presents no ambiguity which would require the assistance of an authoritative interpretation by the Maine Law Court. Consequently, the provision must be stricken, not saved.

Similarly, to avoid constitutional infirmity, the Maine Law Court would have to construe the ordinance's "good cause" provisions in §§ 13-5(a) and 3-116(b) so as to avoid discretionary rulings based either on the message or the messenger. However, in Maine, as elsewhere, good cause typically refers to determinations that are highly contextual, fact intensive and discretionary. *See, e.g.*, Me. R. Civ. P. 5(g)(2) (good cause for accepting filings made after hours or for other courts); Me. R. Civ. P. 16 (good cause for modification of pre-trial and scheduling orders); Me. R. Civ. P. 16B(b)(9)(good cause exemptions from alternative

dispute resolution); Me. R. Civ. P. 26(c)(good cause for protective orders); Me. R. Civ. P. 35(a)(good cause for physical or mental examination); Me. R. Civ. P. 41(b)(good cause for avoidance of involuntary dismissal); *Kingsbury v. Forbes,* 1998 ME 168, ¶ 4, 714 A.2d 149, 150-51 (construing same, noting that "[w]e have stated that 'good cause' is a flexible concept and its application requires the trial court to consider 'the circumstances of each individual case and then to make its determination by exercising a sound discretion"); *Emerson v. A.E. Hotels, Inc.,* 403 A.2d 1192, 1193 n.2 (Me. 1979)(" 'Good cause' is a highly relative concept. It lacks fixed and definite meaning. . ."); Me. R. Civ. P. 55(c)(good cause for setting aside default); *Ireland v. Carpenter,* 2005 ME 98, ¶ 13; 879 A.2d 35, 39 (defining same)(citation omitted); Me. R. Civ. P. 59(c)(good cause for extension of time to serve affidavits); Me. R. Civ. P. 69 (good cause for execution of judgment); 10 M.R.S.A. § 1174 (good cause for automobile dealership franchise relationship modifications and terminations). To construe the "good cause" provision of this ordinance to avoid its infirmity, the Maine Law Court would be required to act as a legislature and infuse into the provision a host of permissible and impermissible criteria, a construction that would run against its prior constructions of the phrase "good cause". This Court concludes this phrase is not susceptible to a limiting construction that is likely to avoid the federal constitutional infirmity.

This Court has also declared that the requirement in section 13-5(c) that the applicant "meet

with the Police Chief to discuss and attempt to agree on the details on the route and other logistics", *see infra* III.C.3.a, violates the First Amendment because of the potentially chilling effect such a meeting could have on speech. Again, this provision presents no ambiguity subject to a limiting construction by the Maine Law Court, and must be stricken, not saved.

A more difficult question is presented by § 13-5(e) and § 3-120. Section 13-5(e) allows the imposition of the costs of police protection but provides no criteria for how those costs are to be assessed other than its reference to the city's collective bargaining agreement. Likewise, § 3-120 allows the imposition of the cost "estimated by the city for cleanup and traffic control" without any criteria for how these costs will be estimated. The City contends that Major Gregoire's testimony amounts to a saving construction by adopting the *Stonewall Union* factors as an authoritative interpretation. This Court has rejected the City's position on this record. But, to presume the Maine Law Court would or this Court should so construe § 13-5(e) to silently infuse criteria set forth in a 1991 Sixth Circuit case would be in derogation of the Augusta City Council's right to enact its own ordinances in a manner consistent with the law. Had Major Gregoire interpreted an ambiguous statute, this might present a proper opportunity to abstain or certify the matter to the Maine Law Court. But the statute, though terse, is unambiguous. *See Dionne*, 583 F. Supp. at 311 (". . . Indeed, the Court finds the relevant statutes to be admirably free of ambiguity"). As such, to abstain or refer

the matter would serve no purpose of comity, and would waste the plaintiffs', the defendant's, and the Law Court's time. *See id.* at 310.

Finally, as regards the exemption in § 3-122 for "athletic events conducted by the Board of Education, the Little League or other organizations", this Court is unconvinced that there is any construction of this provision that could save it. Hence, this clause too must be stricken.

IV. CONCLUSION

Plaintiffs' Motion for Judgment on Liability Issues Based on a Stipulated Record (Docket # 43) is GRANTED. Defendant's Cross-Motion for Judgment is DENIED (Docket # 48). This Court ORDERS the following:

1. Section 13-5(a) of the Parade Ordinance and Section 3-116(b) of the MOGO violate the First Amendment and are unconstitutional to the extent that each requires thirty (30) days' prior notice and a shorter time frame only for "good cause" shown.

2. Section 13-5(c) of the Parade Ordinance, to the extent that it requires an applicant to "meet with the Police Chief to discuss and attempt to agree on the details on the route and other logistics", violates the First Amendment and is unconstitutional.

3. Section 13-5(e) of the Parade Ordinance and Section 3-120 of the MOGO, to the extent that there is no provision allowing for a waiver of fees for indigents, violate the First Amendment and are unconstitutional. Also,

the city's current method of calculating the payment of costs of traffic control and clean up by the applicant violates the First Amendment and is unconstitutional.

4. Section 3-122 of the MOGO, providing an exemption for athletic events "conducted by the Board of Education, Little League or other organizations, provided alcohol is not available" violates the First Amendment and is unconstitutional.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of December, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 04-032-B-W

TIMOTHY SULLIVAN,

Plaintiff,

—v.—

CITY OF AUGUSTA,

Defendant.

ORDER REGARDING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

True to its name, the March for Truth Coalition (Coalition) intends to march. Organized in January 2004, the Coalition has planned a demonstration in Augusta, Maine on Saturday, March 20, 2004, to advocate "worldwide end of war and empire-building, greater honesty and openness in domestic government, affordable health care, veterans' rights and benefits, and living wage jobs." The Coalition intends start its demonstration at the Maine State Capitol building, march through the Augusta city streets, and

end with a rally back at the Capitol. To march on city streets, however, the Coalition needs and has applied for a parade permit from the City of Augusta (City). The City is willing to issue a permit but has conditioned its issuance on the Coalition's payment of traffic control and cleanup costs and the furnishing of a bond or other surety for potential damage. Claiming the City's conditions constitute an unconstitutional burden on its exercise of First Amendment rights, Timothy Sullivan (Sullivan), a Coalition organizer, has filed suit against the City, seeking a temporary restraining order enjoining the City against imposing these conditions. This Court concludes the City's bond requirement delegates excessive discretion to the Augusta Chief of its Police Department (Police Chief) and, therefore, GRANTS the Motion for Temporary Restraining Order on the bond requirement. For all other purposes, however, this Court concludes the Augusta parade ordinance passes constitutional muster and therefore, DENIES the Coalition's motion in all other respects.

I. Factual Background

A. The Ordinance.

The City of Augusta regulates parades, marches, or other similar uses of public ways by requiring organizers to secure a municipal permit. Augusta, Me. Rev. Code Ord. ch. 13 § 5(a) [hereinafter § 13-5]. The application must be filed at least thirty days before the event and must include the name, address, and phone number of the person seeking the permit, the date and time

for the parade, and its intended route. § 13-5(b). The permit costs $100 payable at the time the application is submitted. § 13-5(e).

Once the application is filed, the ordinance requires the applicant to meet with the Police Chief within ten days "to agree on the details of the route and other logistics." § 13-5(c). The Police Chief may deny the permit, alter its route for "traffic or safety reasons," or impose "reasonable conditions, including . . . time limits, requirement to keep moving and on route, no amplification or sound truck, no explosives, fireworks or other artificial noise." § 13-5(d). The Police Department calculates the costs of traffic control and cleanup. § 13-5(e). Finally, the Police Chief *may* also require, prior to the issuance of the permit, that the applicant furnish a bond or a surety company in an amount up to $10,000.00 to "guarantee cleanup . . . compliance with any applicable state and local law or regulation, and payment . . . of all proper claims against the applicant for damage to real or personal property . . . arising out of acts done or omitted to be done by the applicant, his agents or employees." § 13-5(f).[1] Once the Police Department makes these determinations, it informs the applicant. Any additional costs must be paid and evidence of bond or insurance must be presented before the permit is issued. § 13-5(e), (f). An applicant who has been denied a permit or whose permit

[1] The ordinance provides for three ways the applicant may comply with this requirement: (1) a bond of a surety company; (2) cash or negotiable securities in lieu of the bond; or (3) evidence of appropriate insurance. § 13-5(f).

has been modified may appeal to the city council within five days of the denial or modification. § 13-5(g).

B. The Application.

On February 9, 2004, on behalf of the Coalition, Sullivan formally applied for an "Application for Parade Permit" with the City Police Department, proposing three parade routes. The permit stated that the parade would be held on Saturday March 20, 2004, between 12:30-2:00 p.m.

C. The City's Approval With Conditions.

Of the three approved parade routes,[2] Augusta Deputy Police Chief Major Gregoire (Gregoire) determined the first approved route would require twelve officers and two police vehicles for traffic control, costing $2,077.44. Gregiore determined the second approved route would require ten officers and two police vehicles costing $1,761.20.[3] In later discussions, Gregoire approved a third route, costing $1,543.08. In calculating these costs, Gregoire considered only the following factors: "the number of officers needed

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[2] Sullivan initially proposed three routes. The City Police Department denied the first proposed route citing public safety concerns over blocked access to the hospital near Memorial Bridge in the City. Proposed Routes Two and Three were approved. As noted, the applicant later proposed a fourth route, which the City approved with the same conditions, but at slightly less cost.

[3] Note that neither city ordinance cited by the Verified Complaint applies to the State House.

given the parade route, the detail rate, and the estimated length of the parade." *Gregoire Affidavit* at 5. The Gregoire's concern is "traffic control and direction." *Id.* In fixing this fee, Gregoire did not consider the costs of ensuring the safety of the marchers or any counter-protests. If there is any such concern, these factors would have been considered separately and not assessed under the parade ordinance. *Id.* at 6.

Gregoire also determined the Coalition would be required to furnish a bond of surety in the amount of $10,000.00 or evidence of appropriate insurance. Sullivan estimated event insurance would cost approximately $450. Currently, the Coalition claims it has assets of only $1,365, held in trust by other non-profit organizations in Maine.

II. Discussion

A. The Legal Standard.

To prevail on his motion for a temporary restraining order (TRO), Sullivan must demonstrate he has a reasonable likelihood of success on the merits and will suffer irreparable harm if the TRO is not granted. Fed. R. Civ. P. 65; *Westinghouse Broadcasting Co., Inc. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass 1976). Where deprivation of a First Amendment right is involved, irreparable injury is presumed. *Westinghouse*, 409 F. Supp. at 896. (noting "any significant denigration of a First Amendment right constitutes irreparable harm"); *Borreca v. Fasi*, 369 F. Supp. 906, 911 (D. Haw. 1974) (citing *Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969)).

Although Sullivan must demonstrate he has met his burden with respect to the request for preliminary injunctive relief, the burden of demonstrating the constitutionality of the ordinance lies with the City.

B. Preliminary Matters.

As a preliminary matter, this Court must address standing and exhaustion of administrative remedies.

1. Standing[4]

Article III of the Constitution limits the jurisdiction of federal courts to actual cases or con-

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[4] It is difficult to discern in what capacity Sullivan stands before this Court. Sullivan is the named plaintiff in the Verified Complaint and he is self described as "an organizer of the March for Truth Coalition, an unincorporated association." Yet, as the City notes in its response, there is "no allegation that he has brought this action on behalf of the [Coalition] or with authorization from the [Coalition], or what his level of authority is, if any." (Docket No. 4, p. 4.). Sullivan's imprecise allegation is compounded by the parties' failure to agree on who the applicant is. There is no clear indication whether Sullivan filed the permit application in his individual capacity, as he suggested at oral argument, or in an agency capacity on behalf of the Coalition, as the City suggested. The City argues that because Sullivan applied for the permit as a representative of the Coalition, but then filed his Verified Complaint in his individual capacity, he was not subject to denial of the permit and, therefore, has suffered no injury. Sullivan contends he filed the application as an individual and subsequently filed in his individual capacity as a plaintiff. Moreover, he contends he brings suit to challenge the constitutionality of the ordinance, not the denial of a parade permit. Despite the Court's urging, none of this was clarified at oral argument.

(*footnote continued*)

troversies. *Becker v. Federal Election Comm'n*, 230 F.3d 381, 384 (1st Cir. 2000). To establish standing, the plaintiff bears the burden of satisfying three prerequisites: (1) an injury-in-fact; (2) a causal connection between the injury and the conduct complained of; and (3) a "likelihood" the injury can be redressed by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Skrizowski v. United States*, 292 F.Supp.2d 277, 280 (D.N.H. 2003); *see also Sierra Club v. Morton*, 405 U.S. 727, 740 (1970) (rejecting the grounds of "public interest" for standing).

The factual requirements to establish standing vary depending on the stage of proceedings. *Lujan*, 504 U.S. at 561. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. *Id.* Where prospective relief, such as a restraining order, is sought, the plaintiff need only allege facts that the injury is certainly impending, such as "a *sufficient* likelihood that he will again be wronged." *Skrizowski*, 292 F.Supp.2d at 280 (emphasis added); not an "injury-in-fact."

With respect to § 13-5, Sullivan has established standing. As an organizer of the march and a participant, Sullivan has established that he will suffer an "injury in fact," since the conditions of the City's permit will affect him "in a personal

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As a matter of policy, courts should construe pleadings liberally, giving weight to substance over form. *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1171 (1st Cir. 1995). Sullivan signed the permit application and has initiated the suit in his name only. Based on the allegations in the Complaint, this Court considers the Plaintiff to be Sullivan in his capacity as an individual.

and individual way." *Lujan,* 504 U.S. at 560. Further, he has demonstrated a clear causal connection between the injury and the ordinance. Finally, there is a likelihood this Court can redress the injury. *Lippoldt v. City of Wichita,* 265 F.Supp.2d 1228 (D. Kan. 2003).

2. Administrative Remedies

Subsection (g) of §13-5 states that if the permit is modified or denied, the applicant may appeal to the city council within five days. The doctrine of exhaustion provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Gonzalez v. Ritz Carlton Hotel Co. of Puerto Rico,* 241 F.Supp.2d 142, 144 (D.P.R. 2003). The exhaustion doctrine, though mostly applied to state and federal legislation, is applicable to municipal ordinances. *See, e.g., Euge v. Trantina,* 298 F. Supp. 873 (D.C. Mo. 1969). However, where the attack on the statute or regulation is purely constitutional, as it is here, the exhaustion of administrative remedies is not required. *See Weinberger v. Salfi,* 422 U.S. 749, 761-62 (1975). The Augusta City Council would not be in a position to rule on the constitutionality of its own ordinance. *Id.; see also Minster v. Town of Gray,* 584 A.2d 646, 648 (Me. 1990) (citing *Weinberger* and finding that constitutionality of ordinance may not be "determined by the town agency that issues building permits"). Moreover, it is unclear whether the appeal provision is applicable, because there is no evidence the City denied or modified the permit as required by § 13-5(g). Sullivan challenges

the constitutionality of the application of the ordinance, not the denial of a permit.

C. Likelihood of Success of the Merits.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceable to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. 1. Public speaking, parades, or assemblies fall within "the archetype of a traditional public forum." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568 (1995); *see also Casey v. City of Newport*, 308 F.3d 106, 111 (1st Cir. 2002). Requiring a permit and fee for such activity constitutes a prior restraint on speech. *Forsyth County*, 505 U.S. at 130.

Despite the heavy presumption against the constitutional validity of a prior restraint on free speech, permit requirements applied to parades or other uses of public forums have been held to be valid, provided such schemes meet strict constitutional requirements. *Cox v. New Hampshire*, 312 U.S. 569, 574-6 (1941). To withstand constitutional challenge, the permit requirements may not delegate overly broad licensing discretion to a government official. In the words of the *Forsyth County* Court, the decision how much to charge or even whether to charge at all cannot be left "to the whim of the administrator." *Forsyth County*, 505 U.S. at 133. The standards for approval,

denial or the imposition of conditions must be "narrowly drawn, reasonable, and definite." *Id.* at 324; *Niemotko v. Maryland,* 340 U.S. 268, 282 (1951). The time, place, and manner of speech may not be based upon the content of the message; the scheme must be narrowly tailored to serve a significant governmental interest; and "ample alternatives for communication" must be left open. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992). Such content-neutral restrictions—often referred to as "time, place, manner" restrictions—must contain adequate standards to guide an agency's decision, and the decision which must be subject to effective judicial review. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002).

Sullivan challenges § 13-5 on its face as violative of his First Amendment right to free speech. This Court considers first the requirements of the application fee and costs of retaining law enforcement services. § 13-5(d), (e). In *Cox v. New Hampshire,* the United States Supreme Court held that fees related to "the expense incident to the administration of the [event] and to the maintenance of public order in the matter licensed" are not unconstitutional. *Cox,* 312 U.S. at 577. There is no evidence on the record the application fee is anything but administrative. The imposition of these costs is mandatory, not discretionary. § 13-5(e) ("The cost of the permit *shall* be $100, *plus* the costs of traffic control . . . and cleanup costs.") (emphasis added). To the contrary, the record establishes that the police fee is simply a mathematical computation based on the Police Chief's assessment of the

police presence necessitated by the parade route. Sullivan does not contend the City does not have an important interest in maintaining public order. Therefore, with respect to subsections (d) and (e) of § 13-5, the City has met its threshold burden: these portions of the ordinance are constitutional as applied.

The Court now turns to the constitutionality of the bond and/or event insurance requirement. § 13-5(f). In *Freedman v. Maryland*, the Supreme Court recognized the "peculiar dangers" imposed on otherwise constitutionally protected speech when a licensing body's prior approval of the content is contingent upon the issuance of the license. 380 U.S. 51, 57 (1965). The *Freedman* Court noted that a licensing board would likely overestimate perceived dangers of controversial speech. *Id.* at 52-53, n.2. It is "the censor's business is to censor," the Court wrote. *Id.* at 57. The *Freedman* Court held that "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas*, 534 U.S. 316, 321 (2002) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990)).

More recently, in *Thomas v. Chicago Park District*, the Supreme Court expounded on the reach of *Freedman's* procedural requirements to free speech: it held that *Freedman* did *not* apply to permit schemes which are both limited to public safety concerns and void *any* consideration of

content of speech. 534 U.S. at 322 (noting Court has "never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*"). In so doing, the *Thomas* Court also reaffirmed the pertinence of the *Forsyth County* and its progeny, stating:

> even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.

Thomas, 534 U.S. 324 (citing *Forsyth County*, 505 U.S. at 131); *see also New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002).

In the instant case, subsection (f) bestows on the Police Chief the authority to determine whether the applicant must post a surety bond at all and, if so, what the amount of the bond must be up to $10,000.00. The ordinance itself contains no standards whatsoever, much less "narrowly drawn, reasonable and definite" standards, under which the Police Chief is to make this determination. *Forsyth County*, 505 U.S. at 133. The First Amendment "prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133.

Nothing in subsection (f) or its application prevents the police chief from "encouraging some views and discouraging others through [its] arbitrary application. . . ." *Id.* It is difficult for this

Court to envision how the Augusta Police Chief will make the determination as to whether to require the bond or how much to require without making a subjective determination of the content of the applicant's speech, the estimate of the response of others, and the likelihood that the applicant's members will cause or fail to prevent damage to real or personal property. It is this range of considerations that implicates the protections of the First Amendment. *Forsyth County,* 505 U.S. at 134. It is not enough for the City to assert that the Police Chief has *not* exercised his discretion in a content-based fashion; the question is "whether there is anything in the ordinance preventing him from doing so." *Forsyth County,* 505 U.S. at 133. Thus, the practical effect of this subsection is content-based discrimination. *See, e.g., Invisible Empire of the Knights of the Ku Klux Klan v. Town of Thurmont, 700* F.Supp. 281 (D. Md. 1988) (finding a requirement of insurance unconstitutional because it was based on assessment of content of speech). While the City's justification may be substantially related to important government interest, it does not substantiate, nor satisfy a content-based assessment.[5] *Id.* at 136.

The right to free speech is a fundamental right protected by the First Amendment. A government may not regulate speech based on its substantive content or the message it conveys. *Rosenberger v.*

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[5] At oral argument, the City conceded that there is no evidence on the record regarding the procedure used by the police chief's application of subsection (f), unlike that used by the chief in determining costs for subsection (d).

Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995). Such content-based regulations are subject to strict scrutiny and require the government to show that the challenged regulations are necessary to serve a compelling state interest and are narrowly drawn to achieve this end. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). The City has failed to meet this burden. Because the bond and/or event insurance requirement requires to some degree that the police chief assess the content of the proposed event, and because the ordinance fails to articulate the standards by which such a determination of application may be made, subsection (f) is unconstitutional.

D. Severability.

A portion of a statute, regulation, or ordinance which is found to be unconstitutional may be severed so that the remainder of the law may be left valid and enforceable. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). In *Alaska Airlines*, the Supreme Court enunciated the well established standard for determining the severability of an unconstitutional provision: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 684 (citations omitted); *Gilbert v. State*, 505 A.2d 1326, 1329 (Me. 1986) (discussing "longstanding common law rule of severability, which held that 'where an unconstitutional and invalid portion of a statute is separable from and independent of a part

which is valid the former may be rejected and the later may stand' ") (citations omitted). Here, § 13-5 remains fully operative without subsection (f). The portions of the ordinance not classified as unconstitutional remain in effect.

E. Irreparable Harm.

As the Plaintiff's claim involves the deprivation of his First Amendment rights, irreparable harm is presumed. *Westinghouse,* 409 F.Supp. at 896; *Borreca,* 369 F.Supp. at 911.

III. Conclusion

This Court GRANTS in part the Plaintiff's Motion for a Temporary Restraining Order and the City is temporarily enjoined from enforcing subsection (f). The remaining portions of § 13-5 may be enforced.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 19th day of March, 2004.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1177
Entered: February 29, 2008

TIMOTHY SULLIVAN and
LAWRENCE E. DANSINGER,

Plaintiffs, Appellees,

—v.—

CITY OF AUGUSTA,

Defendant, Appellant.

Before
Boudin, *Chief Judge,*
Campbell, *Senior Circuit Judge,*
Torruella, Lynch, Lipez, and
Howard, *Circuit Judges.*

ORDER OF COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

For the reasons stated in Judge Lipez's dissent from the panel opinion, Judge Lipez and Judge Torruella dissent from the denial of en banc review.

HOWARD, *Circuit Judge*. While I doubt that en banc review would improve upon the analyses set forth in the panel opinions, the difficult constitutional issue in this case is significant and would benefit from consideration by the Supreme Court.

By the Court:

/s/ RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

[Certified copies to Hon. John A. Woodcock and Ms. Linda L. Jacobson, Clerk, United States District Court for the District of Maine. Copies to Mr. Kaplan, Mr. Schutz, Mr. Langsdorf, Ms. Williams, Mr. Heiden, & Mr. Webbert.]

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In The

Supreme Court of the United States

TIMOTHY SULLIVAN AND
LAWRENCE E. DANSINGER,

Petitioners,

v.

CITY OF AUGUSTA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit erred in concluding that the City of Augusta's parade ordinance did not violate the First Amendment by charging parade organizers with the costs of traffic control when ample alternative channels of communication were available for use without a fee?

2. Whether the First Circuit erred in reviewing *de novo* the district court's determination that sidewalks are never a sufficient alternative channel of communication to justify a content-neutral time, place, or manner regulation on parades along the City's streets?

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INTRODUCTION

Contrary to the claims of the Petitioners, this case involves a basic application of the established principles regarding time, place, and manner regulations of speech in public streets. Petitioners are incorrect in asserting that the First Amendment requires the public to pay for traffic control so they can march in the street, when other channels of communication – sidewalks, parks, and other public spaces – are available for use by demonstrators. The First Circuit's method of review and ultimate decision apply the law set forth in previous cases from the Court, and this case deserves no further review or consideration.

The First Circuit determined that the City of Augusta's parade ordinance did not run afoul of the First Amendment by charging parade organizers with the reasonable cost of traffic control to close down the City's streets. The First Circuit correctly held that the parade ordinance was a content-neutral, time, place, or manner regulation, and that alternate channels of communication – the sidewalks – were available to those who wished to organize a march without paying the costs of traffic control. The First Circuit's decision is consistent with the Court's ruling in *Cox v. New Hampshire*, 312 U.S. 569 (1941), that a parade ordinance requiring organizers to pay up to $300 in municipal costs was constitutional. Although Petitioners claim that there is a split among the federal circuits on this issue, a review of the relevant cases reveals no legal conflicts, but merely different

outcomes depending on the facts presented in each case.

The Petitioners also challenge the First Circuit's application of a *de novo* standard of review to the district court's findings. The First Circuit's approach is consistent with the Court's decisions in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and is adhered to by the vast majority of appellate courts, both state and federal. No court appears to have adopted the Petitioners' preferred asymmetrical standard of review in the past fifteen years. Moreover, to the extent that a split among the lower courts remains, this is not an appropriate case to resolve the question. The "facts" that the Petitioners seek to insulate from appellate review are not facts, but rather the relevant legal conclusions regarding whether an alternate channel of communication is constitutionally sufficient to justify a time, place, or manner regulation. Other cases, including a Tenth Circuit case that is active and may come before the Court in the near future, present better vehicles for reconsidering the issue should the Court find it necessary to do so.

STATEMENT OF THE CASE

In February 2004, Timothy Sullivan, on behalf of the "March for Truth Coalition," applied to the City of

Augusta (the "City"), the state capital of Maine, for a permit to hold a parade in the City's streets. Petition at 3a. The City indicated that it would grant the permit if Sullivan paid an administrative fee of $100 plus the estimated cost of deploying extra police officers and police vehicles to control and divert traffic during the event. *Id.* The total fee is calculated based on factors that are unrelated to the content of speech, but instead reflect the traffic control requirements of a street parade. *Id.* at 137a. These factors include the parade route, the duration and size of the parade, the extent of necessary road closures, and the existence of other scheduled events or circumstances that conflict with or otherwise affect the anticipated cost of providing police services for the proposed parade. *Id.* There was no evidence to suggest that the City discriminates in the issuance of permits based on the content or subject matter of the parade. *See id.* at 133a. In addition to street parades, numerous groups have held successful sidewalk marches in the City that did not require payment of any fee or police expenses.

Sullivan sued the City in the United States District Court for the District of Maine in March 2004 challenging, *inter alia*, the constitutionality of the fees imposed under the City's parade ordinance. *Id.* at 4a. Sullivan, however, did pay the required fee and his group conducted its parade. *Id.* In September 2004 Sullivan amended his complaint to add Lawrence E. Dansinger, who had applied for a parade permit in August, as an additional plaintiff. *Id.* When

the City indicated that the cost of the parade on his chosen route would be almost $2,000, Dansinger requested a waiver on the ground that he was unable to pay. *Id.* No waiver was granted, and the parade was not held. *Id.* at 5a. Following discovery and submission of the case on a stipulated record, the District Court held, *inter alia*, that the City's parade ordinance was unconstitutional because the ordinance did not provide an indigency exception to the fee requirement. *See id.* at 164a. The District Court held that an indigency exception was required under the Constitution because, in its view, adequate alternative forms of expression were not available. *Id.* at 155a-58a. In so ruling, the District Court relied on the testimony of a sociologist, Prof. Joe H. Bandy III – who had never examined the parade route in question or any potential alternatives – that sidewalk marches were not adequate alternatives to street marches because street marches promote camaraderie and provide "euphoric muscular bonding" among the marchers and sidewalk marches do not. *See id.* at 155a-56a.

The First Circuit reversed, holding that adequate alternatives to a street parade were in fact available to indigent protesters in the City, including sidewalk parades, gatherings on the statehouse steps or other state properties, leafleting, vehicular processions, and mass outdoor gatherings of fewer than 200 people. *Id.* at 57a-58a. None of these alternatives require payment of a fee. The First Circuit concluded: "The plaintiffs have access to numerous speech alternatives,

making a fee waiver to march in the streets unnecessary." *Id.* at 56a-57a.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, there is no circuit split on the issue of whether the First Amendment requires that a city parade ordinance assessing organizers for the reasonable costs of traffic control include an indigency exception. Different results in the lower courts do not stem from any legal disagreement, but rather from different conclusions on the facts by those courts about the availability of alternative channels of communication for First Amendment activities. Taken as a whole, the cases agree that when adequate alternative channels are available, an indigency exception is not required. If there are no adequate alternative channels, then an indigency exception may be necessary to comply with the First Amendment. The First Circuit's decision in this case is consistent with other circuit decisions and the Court's decision in *Cox v. New Hampshire*, 312 U.S. 569 (1941). The Court should decline to grant the petition on this question.

The Court also should decline to grant the petition on the other question presented by the Petitioners: whether the standard of review on appeal for factual findings in First Amendment cases should change, depending on which party won below. The Petitioners exaggerate the extent of the "circuit split"

on this issue; eight other federal appellate courts join the First Circuit in reviewing *de novo* the findings of the district court in a First Amendment case without regard to which party won below. The recent trend supports this approach, and it is possible, if not likely, that the remaining appellate courts may yet join this majority and resolve the differences.

Even if the Court were inclined to consider the issue, this case is a poor candidate for review. The "facts" cited by the Petitioners were not findings specific to the availability of the sidewalks in Augusta on the date and time of the parade in question. Instead, the findings at issue go to the general question of whether sidewalks are a sufficient alternative to streets for First Amendment purposes. This is a legal determination, and is thus subject to plenary review in any case. Finally, other cases pending in the lower courts would present a better opportunity for the Court to address the standard of review question, if it is inclined to do so.

I. THERE IS NO GENUINE CIRCUIT SPLIT REGARDING THE NECESSITY OF AN INDIGENCY EXCEPTION

With respect to the Petitioners' first issue – whether the First Amendment requires an indigency exception to a parade fee requirement – the purported circuit split does not in fact exist. The Petitioners contend that a decision by the Sixth Circuit "held that an indigency exception to a street parade

traffic control fee was not required by the First Amendment," while a decision of the Eleventh Circuit held that the First Amendment does require an indigency exception to such fees. Petition at 24. A review of these cases, however, reveals that the circuits are in agreement that a parade fee may be unconstitutional if adequate alternative means of expression for indigent individuals do not exist. The divergent outcomes in these cases do not reflect a circuit split as to controlling legal principles, but rather the fact that the Sixth Circuit concluded that adequate alternative means of expression existed, while the Eleventh Circuit found otherwise.

In *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), the Sixth Circuit rejected a challenge to a parade fee on the ground that it did not include an indigency exception. The Sixth Circuit distinguished the cases on which the *Stonewall Union* plaintiffs relied, because:

> In each of these cases, failure to satisfy the fee prerequisite precluded the prospective participants' involvement in the constitutionally protected activity. In contrast, in the present case, an alternative forum is available – the Columbus sidewalks which parallel the street are free for purposes of conducting a parade and the parks are available without cost for related speech activities.

Id. at 1137. In other words, the Sixth Circuit held that the parade fee was not unconstitutional because

an adequate alternative forum for expression was available.

In *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), the Eleventh Circuit applied the same legal standard that the Sixth Circuit applied in *Stonewall*, but found a parade fee unconstitutional:

> The granting of a license permit on the basis of the ability of persons wishing to use public streets and parks to demonstrate, to pay an unfixed fee for police protection, *without providing for an alternative means of exercising First Amendment rights*, is unconstitutional.

Id. at 1523-24 (emphasis added). The difference between the outcome in *Stonewall* (parade fee constitutional) and *Walsh* (parade fee unconstitutional) turned not on any disagreement between the Sixth and Eleventh Circuits as to constitutional interpretation, but on the fact that alternative means of expression were determined to exist in *Stonewall*, but did not exist in *Walsh*.

Here, the First Circuit applied the same standard applied in *Stonewall* and *Walsh*, and held that an indigency exception was not required under the First Amendment because adequate alternatives existed: "Our conclusion is simply that there are sufficient alternatives for speech as not to require, constitutionally, that Augusta provide an indigency exception here." Petition at 58a; *see also id.* at 55a ("[A]s in *Stonewall*, the availability of gathering

places for protests, here including especially the state house steps, with its potential for media coverage, demonstrates the ample range of speech alternatives in the City. While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid *if the remaining modes of communication are inadequate. . . .*") (emphasis added) (internal quotation marks omitted).

Likewise, Judge Lipez's dissent in this case focused only on the constitutional adequacy of the alternative channels available to the Petitioners; it did not address the constitutional necessity of an indigency exception for any parade ordinance. *See* Petition at 68a (Lipez, J., dissenting) ("The question thus becomes whether streets provide such a unique forum for the communication of views that other public fora, including sidewalks, cannot be deemed adequate alternatives.").

The focus of the First, Sixth, and Eleventh Circuits on the existence of adequate alternatives is consistent with the Court's decision in *Bullock v. Carter*, 405 U.S. 134 (1942), in the analogous context of ballot access fees. The Court in *Bullock* held that Texas ballot access fees were unconstitutional because, other than paying the fee, the State provided "no reasonable alternative means of access to the ballot." *Id.* at 149; *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("[W]e hold that *in the absence of reasonable alternative means of ballot access*, a State

may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.") (emphasis added). The same issue of adequate alternatives informs the decisions of the First, Sixth, and Eleventh Circuits on the parallel issue of parade permit fees.

Petitioners' reliance on *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983) is somewhat mysterious, as the holding there had nothing to do with an indigency exception. Rather, the decision turned on the fact that there was "no evidence that the administrative fee charged and to be charged to plaintiffs is equal to the cost incurred or to be incurred by defendants" in connection with the proposed demonstration, a totally different issue. *See id.* at 1056 (internal quotation marks omitted). Petitioners engage in substantial understatement in conceding that the absence of an indigency exception was "not the exclusive basis" for the Second Circuit's decision since the indigency exception issue had no bearing whatsoever on the decision.

In sum, there is no circuit split involving an indigency exception for the Court to resolve. The circuits that have addressed the issue agree that a parade fee requirement may be unconstitutional *if* adequate alternative fora for expressive activity do not exist. No circuit disagrees with the First Circuit on this point, and the divergent outcomes in these cases simply reflect differing conclusions as to the existence of adequate alternatives on the particular facts presented.

II. THE PAST FIFTEEN YEARS HAVE SEEN A CONSISTENT TREND AWAY FROM THE ASYMMETRICAL STANDARD OF REVIEW ADVOCATED BY THE PETITIONERS

A. The Petition overstates the split among lower courts, as the majority of courts apply a consistent standard of review to the facts in First Amendment cases.

Contrary to the Petitioners' claim that federal appellate courts split 4-3 on the standard of review in First Amendment cases, at least *twelve* federal appellate courts have addressed the applicable standard of review, and nine of them *decline* to apply the asymmetrical standard of review.[1] Thus, the clear majority of circuits take the same position as the First Circuit:

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[1] Some of these courts distinguish between independent review of "critical facts" or "constitutional facts," and other facts that, even in a First Amendment case, are appropriately reviewed for clear error. *See, e.g., United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (noting that "the special *Bose* rule applies only to 'constitutional facts' "); *Tavoulareas v. The Washington Post Co.*, 759 F.2d 90, 108 (D.C. Cir. 1985) (stating that "if the Court's statement in *Bose* [regarding *de novo* review] is not limited to the ultimate constitutional fact . . . then we see no rational stopping point short of holding all factual issues in a First Amendment case are for the court. . . . There is no indication that *Bose* was meant to set forth such a sweeping proposition") (quotation marks and citations omitted). To the extent that courts vary in the approach they take on this point, the difference does not depend upon which party prevailed in the district court, and it is therefore not implicated by this petition.

they decline to alter the standard of review based on which party prevailed in the district court. In fact, no court appears to have adopted the Petitioners' proposed asymmetrical standard since 1993.

The petition correctly identifies four of the circuit courts that, relying on the Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), eschew the unequal treatment of facts found in First Amendment decisions when reviewed on appeal: the First Circuit, *see United States v. Frabizio*, 459 F.3d 80, 96 (1st Cir. 2006) (Torruella, J., concurring) and this case; the Fifth Circuit, *see Lindsay v. City of San Antonio*, 821 F.2d 1102, 1109 (5th Cir. 1987); the Tenth Circuit, *see United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), *pet. for reh'g en banc filed* June 19, 2008; and the Eleventh Circuit, *see Don's Porta Signs, Inc. v. City of Clearwater, Fla.*, 829 F.2d 1051, 1053 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

The Petitioners fail, however, to note that five other circuits have joined these courts in reviewing *de novo* the findings of fact in First Amendment challenges that are successful in the district court. These courts include the Second Circuit, *see Bronx Household of Faith v. Board of Educ. of the City of New York*, 331 F.3d 342, 348 (2d Cir. 2003); the Third Circuit, *see Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984); the Sixth Circuit, *see Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520, 525-26 (6th Cir. 2007); the Eighth Circuit, *see Jacobsen v. City of Rapid City, S.D.*, 128

F.3d 660, 662 (8th Cir. 1997); and the D.C. Circuit, *see Tavoulareas v. The Washington Post Co.*, 759 F.2d 90, 98 (D.C. Cir. 1985).

At the state level, the Colorado Supreme Court has specifically addressed the question and rejected an asymmetrical standard of review. *See Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 270-71 (Colo. 1997). The Massachusetts Appeals Court, while declining to decide the issue, also conducted plenary review rather than defer to the factual findings that supported the lower court's decision that a First Amendment violation had occurred. *See T & D Video, Inc. v. City Of Revere*, 848 N.E.2d 1221, 1232 (Mass. App. Ct. 2006).

These cases establish a clear and definite trend away from adopting the asymmetrical standard of review urged by the Petitioners. Respondents have not found a federal appellate or state high court that has adopted the asymmetrical standard since the Fourth Circuit did so in 1993. *See Multimedia Publ'g Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993). Prior to that decision, the last court to adopt the asymmetrical standard was the Ninth Circuit in 1988 (before Justice White's dissent from the denial of certiorari in *Don's Porta Signs*). The clear majority of circuits review *de novo* the relevant facts in First Amendment cases, regardless of which party prevailed in the lower court.

B. The Court's decision in *Hurley* post-dates the circuit court decisions using an asymmetrical standard of review, and may yet resolve any remaining differences.

One reason why there have been no recent converts to the asymmetrical standard of review is the Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In that case, the Court re-emphasized the need for independent review in First Amendment cases generally, and did not distinguish between those cases in which the First Amendment challenge succeeded in the district court and those in which it failed:

> [O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).... This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls *on the near or far side of the line of constitutional protection.*

Hurley, 515 U.S. at 567 (emphasis added). In referring to this "obligation," the Court did not reserve the

need for independent review only in those cases where the First Amendment claim failed in the district court. Instead, the court said that *de novo* review was necessary to decide those cases in which the conduct falls on the "far side" of constitutional protection – which is what the First Circuit did in this case.

Academic commentators also have criticized the asymmetrical standard. "In our view, independent judgment review of the idea-expression decision is valuable even when the defendant won at trial: Whoever won, independent review should produce more refinement of the legal standards, something *Bose* says is constitutionally valuable." Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431, 2442 (1998).

The intervening decision in *Hurley*, combined with the trend away from and criticism of the asymmetrical standard, raises the real possibility that the few outlying courts will recognize the weight of authority and resolve the issue in favor of symmetrical review. The Court should therefore decline to step in now and, instead, wait to see of the issue resolves itself in future cases.

III. EVEN IF THE COURT WERE INCLINED TO ADDRESS THE STANDARD OF REVIEW ISSUE, THIS CASE IS NOT THE IDEAL VEHICLE TO RESOLVE THE QUESTION

A. The standard of review was not addressed in any detail in the First Circuit's opinion.

Although a variety of cases have discussed the merits and disadvantages of an asymmetrical standard of review in First Amendment cases, this is not one of them. The issue was touched upon only in passing in the parties' briefs before the First Circuit, and the court did not address the issue directly in its opinion. *See* Petition at 12a-13a. Even the dissent by Judge Lipez did not accord any deference to the factual findings of the District Court, and instead engaged in a lengthy independent review of the record. *Id.* at 70a-82a (Lipez, J., dissenting). Judge Howard, concurring in the denial of *en banc* review, suggested that the Court consider reviewing the indigency exception but did not refer to the standard of review question. *See* Petition at 182a (referring to "the difficult constitutional *issue* in this case") (emphasis added).

In contrast to this case, there have been other cases that have fleshed out this issue and discussed it in far greater detail. At least one of those cases may yet come to the Court, and presents a much better vehicle for resolving this issue. *See Friday*, 525 F.3d 938 (petition for rehearing en banc filed on June 19th,

2008). If, as petitioner contends, the split is likely to continue, then other cases will provide a more fully developed record and basis for the Court's decision.

B. The "facts" at issue here are actually legal conclusions, which are subject to *de novo* review in any case.

The "facts" that the Petitioners identify in this case as deserving the protection of the "clearly erroneous" standard, notwithstanding the language of *Bose*, are not "facts" at all, at least not in the way envisioned by Rule 52(a). Instead, these "facts" are legal conclusions that go to the primary legal issue in this case: whether the Augusta parade ordinance is a valid content-neutral, time, place, or manner restriction that "leave[s] open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The specific "facts" identified by the petitioners are:

- that sidewalk marches are less safe, and that this may deter some people from participating;

- that sidewalk marches would not interrupt traffic and change routines, and therefore would not garner as much attention from the media;

- that a sidewalk march would be narrower and not allow for wide placards and banners, and would make the march look smaller;

- that a sidewalk march would dampen the camaraderie among participants by preventing side-by-side marching;

- that a sidewalk march lacks the symbolic significance of a street march.

Petition at 7-8.

These conclusions are not the type of facts that asymmetric review is intended to protect. Instead, they are the relevant *legal conclusions* necessary to determine whether the sidewalks were constitutionally sufficient alternative channels of communication for the Petitioners. Even applying an asymmetric standard to facts, this inquiry would be subject to *de novo* review as the relevant legal question in the case.

Compare the "facts" listed above with the findings made by the district court in *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985), a case that applied asymmetrical review. In that case, the findings of fact at issue were whether the Chicago Transit Authority (CTA) had a "consistently-enforced policy of rejecting controversial public-issue advertising." *Id.* at 1229-30. This determination involved the review of evidence of past actions by the CTA, as well as witness statements regarding the CTA's policies and enforcement. *Id.* at 1230. The Court also reviewed for clear error the district court's finding as to whether the CTA's concerns about disruption, rider discomfort, and a loss in revenue. *Id.* at 1231.

Facts such as those considered in *Planned Parenthood Ass'n/Chicago Area* are traditional, historical facts that may affect the outcome of a constitutional case, but require specific testimony and findings. If the district court in this case had found that the sidewalks of Western Avenue in Augusta were impassable or dangerous because of their condition, or that the amount of traffic along the route was significantly greater than the traffic that passes the statehouse steps, then those facts might be entitled to greater deference *if* asymmetrical review applied. *Cf. Pouillon v. City of Owosso*, 206 F.3d 711, 718 (6th Cir. 2000) (noting that "[w]hat constitutes such a channel is a matter of law," but that whether or not a particular channel was available is a question for the fact-finder).

In this case, the District Court's findings were not specific to Augusta or the issues in this case. Its concerns about the adequacy of sidewalks compared with street marches were general; one could draw the same conclusions about sidewalks in Philadelphia, or Wichita, or Seattle.[2] Because these "factual findings" were in fact the relevant legal determination – whether there were adequate alternative channels of

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[2] Indeed, the expert witness on whose testimony the District Court relied was a professor offered as an expert in "social movements"; he had never visited Augusta and had no information about the operation of the Augusta ordinance or the conditions or specifics of the Petitioners' proposed parade route. Petition at 155a-56a n.29.

communication available to the Petitioners – the First Circuit properly employed plenary review. Judge Lipez, in dissent, likewise conducted a plenary review of this issue, recognizing it as a legal inquiry: "I share the district court's view that the options proffered by the City fall short of the constitutional standard." Petition at 67a.

Legal issues are not facts, and nothing in *Bose* or *Hurley* supports a standard of review that defers to a district court's ultimate determination of the legal issues before the Court. The very point of the exception to Rule 52(a) announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Bose* is to ensure that these crucial decisions are carefully reviewed by the appellate court, to ensure maximum protection of the actual boundaries of the First Amendment. "This Court's duty is not limited to an elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *Bose*, 466 U.S. at 508. Professor Monaghan has made a similar point:

> [I]f labeling something a question of constitutional fact guarantees that it will be treated like a question of law, then either party is entitled to independent appellate review. In *Bose* itself, the Supreme Court reviewed de novo the conclusion of a court of appeals that had sustained, not denied, the federal claim.

Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 245-46 (1985).

Because the "facts" that the Petitioners are urging are actually legal conclusions, this case is not an appropriate vehicle to decide the merits of an asymmetrical standard of review for First Amendment decisions.

IV. THE FIRST CIRCUIT'S DECISIONS WERE CORRECT

A. The First Circuit correctly determined that no indigency exception to Augusta's parade ordinance was necessary, given the ample alternative channels of communication available to the Petitioners.

Regulations concerning the use of a public forum that ensure the safety and convenience of the people are not "inconsistent with civil liberties but are one of the means of safeguarding the good order upon which civil liberties ultimately depend." *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). The First Circuit's decision was entirely consistent with more than fifty years of Supreme Court precedent, the decisions of other state and federal courts, and common sense.

The Petitioners' argument flies in the face of the Court's seminal opinion on the subject of fees for parades, *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Cox*, marchers challenged a New Hampshire statute requiring a license and payment of a fee of not

more than $300 before parading on public streets as an unconstitutional abridgement of their First Amendment rights. The New Hampshire Supreme Court had construed the statute as requiring a "reasonable fixing of the amount of the fee," which could vary from a nominal amount up to $300.[3] *Id.* at 576. In referring to the fee charged, the Court stated:

> The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair fee schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

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[3] Significantly, when adjusted for inflation, the $300 maximum fee permitted by the statute approved in 1941 in *Cox* would be $4,421.06 in today's dollars – more than twice the amount that the Petitioners were assessed under Augusta's parade ordinance. *See* Bureau of Labor Statistics inflation calculator, *available at* http://data.bls.gov/cgi-bin/cpicalc.pl. *See also Forsyth County, Georgia v. Nat'l Movement*, 505 U.S. 123, 139 (1992) (Rehnquist, J., dissenting) ("[In *Cox*], the Court expressly recognized that the New Hampshire state statute allowed a city to levy much more than a nominal parade fee.").

Id. at 577 (quoting *State v. Cox*, 16 A.2d 508, 513 (N.H. 1940) (emphasis added)).

Applying the Court's precedents, a number of courts have, like the First Circuit, refused to create a right for persons to close public roads to traffic at no cost. *See Stonewall Union*, 931 F.2d at 1133 ("[*Cox*] considered a municipality's right to impose a license fee for parade permits and found that as long as the fee was designed to meet the expenses incident to the administration of the law and the cost of maintaining public order for the parade, such a charge did not impermissibly burden First Amendment rights. Subsequent Supreme Court cases do not suggest otherwise."); *see also Sauk County v. Gumz*, 669 N.W.2d 509, 537-38 (Wis. Ct. App. 2003) (refusing to create indigency exception to parade ordinance where there are "ample alternative means of assembling and speaking," and finding that "the reasoning of *Stonewall* is sound"); *Gay and Lesbian Services Network, Inc. v. Bishop*, 841 F. Supp. 295, 296 n.3 (W.D. Mo. 1993) ("The Court now determines that Plaintiffs' additional objections, namely the lack of an indigency exception, and the alleged lack of procedural safeguards, are without merit."); *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109-10 (6th Cir. 1997) ("[A]n ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to

defraying expenses incurred in furtherance of a legitimate state interest.").

In addition to running afoul of the Court's prior holdings, elevating an indigency exception to a constitutional requirement would be unworkable in practice and bad policy. First, virtually any group could find an indigent person to "sponsor" an event, thereby evading the City's constitutionally permissible effort to defray public safety costs. An indigency exception would become the classic exception that swallows the rule.

Second, an indigency exception would raise problems of intrusive and complex evidentiary inquiries and line-drawing. An indigency exception would need to include adequate measures to protect the taxpayers from inaccurate claims of poverty. The City would face uncertainty as to whether it should analyze indigency based on an applicant, the sponsoring group, or the participants in the march. Topics of inquiry would include: (A) the resources of the sponsoring individual/group; (B) the budget for the event; (C) annual budget; (D) the potential attendance; (E) the individual/group's ability to raise and solicit donations; and (F) the intention to solicit donations. This will create difficult and time-consuming evidentiary inquiries into financial status, not to mention burdens on the First Amendment right to anonymous speech, *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and association, *see NAACP v. Alabama*, 357 U.S. 449 (1958).

Third, Plaintiffs would, if successful, force City of Augusta taxpayers to subsidize their speech by paying for the police resources necessary to close the streets to traffic. If Plaintiffs wish to engage in expressive activities in the middle of a public road in the City of Augusta, it is not unreasonable for them to pay for the cost of closing the road to motor vehicles, much like they would pay to rent a room at the Augusta town hall for a meeting. It is entirely reasonable for those wishing to exercise their right to freedom of expression in a city street to bear the cost of safely diverting traffic from that location. The alternative would either be significant administrative difficulties or the foisting of those costs on the community. "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (quotation marks omitted). "It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Capitol Sq. Review Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

B. The First Circuit's independent review of the relevant facts complies with the Court's decisions in *Bose* and *Hurley*.

For many of the reasons already discussed, the First Circuit's decision to review *de novo* the district court's conclusion that ample alternative channels of

communication were available to Petitioners was correct. The Petitioners are proposing a standard that: (1) is inconsistent with the Court's statements in *Bose* and *Hurley*; (2) is fundamentally unfair; and (3) is detrimental to the development of law interpreting the First Amendment.

First, the asymmetric standard urged by Petitioners is in conflict with the principles set forth in *Bose* and *Hurley*. Those decisions were premised on the rationale that the appellate court must conduct a thorough review to ensure that the First Amendment claims received full and fair consideration. Nothing in those opinions, however, indicates that this review should be applied unevenly, based on which party won below. To the contrary, the Court in *Hurley* said that the purpose of plenary review was to ensure careful review of First Amendment claims to see whether they fell on the "near or far side of the line of constitutional protection." *Hurley*, 515 U.S. at 567.

Second, the Court should decline to adopt any standard of review that treats identically situated parties differently. Such an approach is inconsistent with the concept of equal justice under the law and is simply unfair. *Cf. Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1085 (3d Cir. 1984) (expressing "discomfiture" at the "abnormality" of a proposed asymmetric standard of review). Moreover, the insulation of certain "findings of fact" on appeal could lead to more inconsistency and conflict among the lower courts, as the importance of a district court's interpretation is increased and the appellate court's fundamental

ability to review is decreased. The asymmetric standard also would be difficult, if not impossible, to apply in some cases where the identity of the prevailing party is murky. What if, for example, on the basis of its factual findings, the Court rejects some First Amendment challenges to a particular regulation or statute but upholds others?

Finally, asymmetric review is unhelpful for the development of the law interpreting and applying the First Amendment. It deprives the appellate courts of the ability to analyze meaningfully the district court's opinion and consider "close cases" that may be important to delineating the contours of the First Amendment's applicability. *See* Volokh & McDonnell, 107 Yale L.J. at 2442.

CONCLUSION

For the reasons stated, respondents respectfully request that the Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TIMOTHY SULLIVAN and LAWRENCE E. DANSINGER,

Petitioners,

—v.—

CITY OF AUGUSTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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REPLY BRIEF FOR PETITIONERS

I. THIS COURT HAS ALREADY RECOGNIZED THE GENUINE CIRCUIT SPLIT CONCERNING THE CONSTITUTIONALITY OF GOVERNMENTAL FEES ON CORE FREE SPEECH ACTIVITIES

Respondent argues that there is no genuine circuit split concerning the constitutionality of the government charging large fees for free speech activities on public streets. This Court, however, has already unanimously recognized the circuit split. In 1992, this Court "granted certiorari to resolve a conflict among the Courts of Appeals concerning the constitutionality of charging a fee for a speaker in a public forum." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). The majority in *Forsyth* ultimately found it unnecessary to decide that issue, but all four dissenters agreed with the majority that "the question which divides the Courts of Appeals" is whether "the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets." *Id.* at 138 (Rehnquist, C.J., dissenting).

In *Forsyth* this Court identified both the Eleventh Circuit and the Second Circuit as part of the circuit split on this issue, citing the same two rulings relied upon by Petitioners in their Petition for Certiorari. *Id.* at 128-29 & n.8 (citing *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985) and *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir.

1983)). This Court clearly considered those rulings in favor of free speech claims to be in conflict with the Sixth Circuit's ruling denying free speech claims in *Stonewall Union v. Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991). *Forsyth*, 505 U.S. at 129 n.8. Although Respondent contends that *Stonewall* and *Walsh* "do not reflect a circuit split as to controlling legal principles," this Court in *Forsyth* concluded otherwise. This Court did not view the holding in *Stonewall* as limited to circumstances where there was an adequate alternative means of expression, but instead summarized *Stonewall's* holding more broadly, as "permitting greater than nominal fees that are reasonably related to expenses incident to the preservation of public safety and order." *Id.* Similarly, neither the Eleventh Circuit itself nor this Court has ever interpreted the Eleventh Circuit's holding in *Walsh* as reconcilable with the Sixth Circuit's ruling in *Stonewall*.

Respondent also unpersuasively argues that the Second Circuit ruling cited in the Petition, *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983), is irrelevant to the circuit split. Once again, this Court in *Forsyth* reached a different conclusion, and expressly identified the Second Circuit ruling as part of the circuit split. 505 U.S. at 129 n.8. Since *Forsyth* was decided, *Powers* has also been cited as precedent for the conclusion that when a First Amendment challenge is made to more than nominal government fees for engaging in core free speech activities, "in virtually all such cases, the courts have concluded

that the requirement was unconstitutional as applied to the plaintiff unable to pay." *Van Arnam v. Gen. Serv. Admin.*, 332 F. Supp. 2d 376, 406 (D. Mass. 2004) (citing *Powers, inter alia*, and summarizing its holding as follows: "$200 fee and insurance requirements were not narrowly tailored as applied to those 'demonstratively unable to comply and whose speech is therefore chilled by state action'").

Finally, a majority of judges on the First Circuit also disagrees with Respondent's position that the issue in this case whether the First Amendment requires an indigency exception is not worthy of review by this Court. The majority in the panel opinion below concluded their analysis on the indigency exception issue with the observation that whether "an indigency exception is constitutionally required . . . is for the Supreme Court to decide in the first instance." Pet.App. at 58a. In addition, two of the five active judges of the First Circuit voted to rehear the case *en banc*, and a third judge stated that "the difficult constitutional issue in this case is significant and would benefit from consideration by the Supreme Court." *Id.* at 182a.

II. THE CIRCUITS ARE CLOSELY AND DEEPLY DIVIDED ON THE PROPER STANDARD OF APPELLATE REVIEW IN CASES UPHOLDING FIRST AMENDMENT RIGHTS

Respondent incorrectly asserts that the First Circuit's application of a *de novo* standard of appellate review to the district court's factual

findings "is adhered to by the vast majority of appellate courts," Brief in Opposition at 2, and that nine federal appellate courts "decline to apply the asymmetrical standard of review." Brief in Opposition at 11 (emphasis added). Rather, as stated in the Petition, there is a 4-3 split, with three other circuits definitively ruling consistently with the First Circuit and three other circuits definitively ruling the other way.

Petitioners' description of the circuit split, not Respondent's, is consistent with how it is perceived by the other federal appellate courts. In 2006, Judge Torruella of the First Circuit discussed the circuit split in a concurring opinion. *United States v. Frabizio*, 459 F.3d 80, 96 (1st Cir. 2006) (Torruella, J., concurring). He identified the Fourth, Seventh, and Ninth Circuits as applying *de novo* appellate review only when the lower court ruling denied free speech claims and the Fifth and Eleventh Circuits as adopting the contrary position. *Id.* He did not identify any of the other five circuits that the Respondent claims to be on its side, even though most of them were decided long before 2006. Similarly, in a decision just handed down three months ago, the Tenth Circuit discussed the circuit split but did not identify any of the five circuits relied upon by the Respondent as having taken a position on the issue yet. *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008).

There is good reason for the absence of any supporting authority for Respondent's characterization of the circuit split as one-sided in its favor. In

all five of those cases cited by Respondent there is no discussion whatsoever of the conflicting authority or the possibility of applying the asymmetrical standard. Thus, Respondent is plainly incorrect to describe these circuits as deciding to "decline to apply the asymmetrical standard of review" when they do not even mention, much less discuss, that standard of review.

For example, the Third and Sixth Circuit rulings cited by Respondent were appeals of summary judgment decisions. *See Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984); *Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520 (6th Cir. 2007). In that setting, of course, there is never any deference on appeal to fact findings of the trial court and the clearly erroneous standard of Rule 52(a) has no application. The Second Circuit case cited by the Respondent is also inapt. *See Bronx Household of Faith v. Bd of Educ.*, 331 F.3d 342 (2d Cir. 2003). That case concerned the review of the grant of a preliminary injunction, and the Second Circuit expressly applied the 'clearly erroneous" standard for reviewing the factual findings of the trial court. *Id.* at 348. In other cases, the Second Circuit has suggested that it would apply the asymmetrical standard of review, but because there was no definitive holding on the issue, Petitioners did not cite this case as part of the circuit split. *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("In the present case, *since appellants seek vindication of rights protected under the First Amendment*, we are required to make an

independent examination of the record as a whole without deference to the factual findings of the trial court.") (emphasis added) (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) and *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995)). The Eighth Circuit case cited by the Respondent has no discussion whatsoever of the standard of review for factual findings by the trial court and its ruling is based on the purely legal issue whether an airport terminal was a public forum. *See Jacobsen v. City of Rapids, S.D.*, 128 F.3d 660, 662 (8th Cir. 1997). Finally, the D.C. Circuit case cited by the City was vacated and replaced with an *en banc* ruling. *See Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), *vacated by and rehearing granted en banc*, 763 F.2d 1472, 1481 (D.C. Cir 1985), *superseding opinion at* 817 F.2d 762, 767 (D.C. Cir. 1987) (*en banc*). In any event, that case is irrelevant to the standard of review issue here because the only factual findings at the trial level were made by a jury that rejected the free speech defense claims of the newspaper and other defendants in a libel case.

The cases cited by Respondent contradict its claim that there is "a clear and definite trend away from adopting the asymmetrical standard of review urged by the Petitioners." Brief in Opposition at 13. For example, a 2006 case cited by the Respondent identifies the circuit split on the standard of review, but declines to resolve it, hardly a sign of any obvious trend. *T & D Video, Inc. v. City of Revere*, 848 N.E. 2d 1221, 1232 (Mass. Ct. App. 2006).

Rather, the court in that case found that the federal circuit split was both deep and ongoing: "The Federal circuit courts of appeals *currently* disagree, however, on whether independent review should be applied to decisions affirming constitutional expressive rights." *Id.* (emphasis added) (citing three federal circuits supporting clear error standard and two federal circuits applying de novo review).

Although the Respondent argues that this Court's 1995 decision in *Hurley* resolves the circuit split in favor of a symmetrical standard of review, no court or commentator has adopted that same interpretation. None of the three circuits supporting the clearly erroneous standard of review has given any indication that they are likely to reverse their position on this issue. For example, after this Court's 1995 decision in *Hurley*, the Ninth Circuit reaffirmed its rule that "when the district court strikes down a restriction on speech, as in the current case, this court reviews the findings of fact for clear error." *Lovell v. Poway Unified Sch. Dis.*, 90 F.3d 367, 370 (9th Cir. 1996) (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1998)).

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The standard of review circuit split dates back over 20 years and is clearly presented in this case. In its ruling below, the First Circuit expressly rejected "plaintiffs' contention that plenary review is reserved only for district court decisions denying

First Amendment challenges." Petition at 13a n.1. The proper standard of review is a pure legal issue that has been well ventilated in both federal appellate rulings and academic writings. *See* Petition at 17-21. Thus, there would be no benefit from further percolation of this issue before it is resolved by this Court.

The trial court's ruling in favor of Petitioners' free speech claims was supported by historical facts and expert factual findings normally accorded deference on appeal under Rule 52(a). For example, the record is clear that the Augusta, Maine sidewalk at issue is unusually narrow, about 36 to 42 inches wide, and would fit at most two to three people walking side by side. Plaintiffs' Statement of Material Facts, ¶ 62 (citing deposition testimony of Augusta Deputy Police Chief Major Gregoire at p. 39). Moreover, portions of this sidewalk are immediately adjacent to the road traffic. *Id.* This information in the record clearly constitutes facts and not, as the Respondent asserts, legal conclusions. Moreover, these facts support the finding of the trial court – rejected by the panel majority – that the sidewalks "were insufficient because they are too narrow and marginal as compared with main streets." Pet.App. at 55a. The dissent specifically identified the unusually narrow width of the sidewalk as supporting the district court's conclusion that "the sidewalk option here is particularly limiting." *Id.* at 75a n.22.

Not only did the panel majority fail to give deference to the facts supporting the district court's

findings about the greater safety and logistical advantages of street marches, but it also chose to give greater weight to other historical facts in the record. For example, the majority discounted the expert testimony relied upon by the district court concerning the serious disadvantages of a sidewalk march, and instead chose to rely on the testimony of the City's Deputy Police Chief, "that several groups have used sidewalk marches to engage in expressive activities, indicating the availability of the sidewalk alternative and its appeal to some persons." *Id.* at 55a. Once again, it cannot reasonably be disputed that the panel majority relied on historical facts in the record and not legal conclusions.

Although the Plaintiffs' expert witness did not provide factual information about Augusta, Maine, he did provide specific facts that supported the district court's findings that the sidewalk was not a safe or logistically adequate alternative to a street march. For example, the dissent cited the expert witness's testimony that "social movements have none or very few alternative methods to communicate their message other than low-cost demonstrations in public spaces and streets." *Id.* at 78a-79a (quoting Declaration of Expert Witness). Expert testimony about social science is still factual, even if not based on observation of unique circumstances concerning the parties, and still entitled to Rule 52(a) deference on appeal. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-236, 255-256 (1989) (affirming factual finding of district court as supported in part by testimony of

social science expert who based her opinion on a review of comments by decisionmakers "without having met any of the people involved in the decisionmaking process").

Because the panel majority openly conducted a de novo weighing of the evidence in the record without any deference to the facts supporting the trial court findings, a decision of this Court in favor of Petitioners on the standard of review issue would require that the decision of the First Circuit be either reversed or vacated.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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